IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 203

DENNIS COUNCLE MCGAUTHA,

Petitioner,

—v.—

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CALIFORNIA

PETITION FOR CERTIORARI FILED JUNE 21, 1969
CERTIORARI GRANTED JUNE 1, 1970

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[fol. 1]

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

S. C. No. A 219578

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

DENNIS COUNCLE MCGAUTHA, FANNIE LUE SMITH and WILLIAM RODNEY WILKINSON, DEFENDANTS

INFORMATION

ROBBERY (Sec. 211 P.C.)—Cts. I, II
MURDER (Sec. 187, P.C.)—Ct. III

The said DENNIS COUNCLE McGAUTHA, FANNIE LUE SMITH and WILLIAM RODNEY WILKINSON are accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of ROBBERY, in violation of Section 211, Penal Code of California, a felony, committed as follows: that the said DENNIS COUNCLE McGAUTHA, FANNIE LUE SMITH and WILLIAM RODNEY WILKINSON on or about the 14th day of February, 1967, at and in the County of Los Angeles, State of California, did willfully, unlawfully, feloniously and by means of force and fear take personal property from the person, possession and immediate presence of Pon Lock.

That at the time of the commission of the above offense said defendants, DENNIS COUNCLE McGAUTHA and WILLIAM RODNEY WILKINSON, were armed with deadly weapons, to wit, handguns.

[fol. 2] COUNT II

For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charge set forth in Count I hereof, the said DENNIS COUNCLE McGAUTHA, FANNIE LUE SMITH and WILLIAM RODNEY WILKINSON are accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of ROBBERY, in violation of Section 211, Penal Code of California, a felony, committed as follows: That the said DENNIS COUNCLE McGAUTHA, FANNIE LUE SMITH and WILLIAM RODNEY WILKINSON on or about the 14th day of February, 1967, at and in the County of Los Angeles, State of California, did willfully, unlawfully, feloniously and by means of force and fear take personal property from the person, possession and immediate presence of Benjamin Smetana.

That at the time of the commission of the above offense said defendants, DENNIS COUNCLE McGAUTH and WILLIAM RODNEY WILKINSON, were armed with deadly weapons, to wit, handguns.

[fol. 3] COUNT III

For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charges set forth in all the preceding counts hereof, the said DENNIS COUNCLE McGAUTHA, FANNIE LUE SMITH and WILLIAM RODNEY WILKINSON are accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of MURDER, in violation of Section 187, Penal Code, a felony, committed as follows: That the said DENNIS COUNCLE McGAUTHA, FANNIE LUE SMITH and WILLIAM RODNEY WILKINSON on or about the 14th day of February, 1967, at and in the County of Los Angeles, State of California, did willfully,

unlawfully and feloniously and with malice aforethought murder Benjamin Smetana, a human being.

EVELLE J. YOUNGER
District Attorney for the
County of Los Angeles,
State of California

By /s/ Stanley Friedman
STANLEY FRIEDMAN
Deputy

lma

[Filed in open Superior Court of the State of California, County of Los Angeles, on motion of the District Attorney of said County. Dated: Apr. 6, 1967, William G. Sharp, Clerk, By E. Hillard, Deputy.]

[fol. 4] A219578

That before the commission of the offenses hereinbefore set forth in this information, said defendant, DENNIS COUNCLE McGAUTHA, under the name of Dennis McGautha, was in the District Court of the State of Texas, for the County of Dallas, convicted of the crime of THEFT OVER $50, a felony, and the judgment of said court against said defendant in said connection was on or about the 26th day of October, 1943, pronounced and rendered and said defendant served a term of imprisonment therefor in the State Prison.

That before the commission of the offenses hereinbefore set forth in this information, said defendant, DENNIS COUNCLE McGAUTHA, under the name of Dennis McGautha, was in the District Court of the State of Texas, for the County of Dallas, convicted of the crime of ROBBERY, a felony, and the judgment of said court against said defendant in said connection was on or about the 26th day of October, 1943, pronounced and rendered and said defendant served a term of imprisonment therefor in the State Prison.

That before the commission of the offenses hereinbefore set forth in this information, said defendant, DENNIS COUNCLE McGAUTHA, under the name of Dennis McGautha, was in the District Court of the State of Texas, for the County of Harris, convicted of the crime of MURDER WITHOUT MALICE, a felony, and the judgment of said court against said defendant in said connection was on or about the 23rd day of November, 1948, pronounced and rendered and said defendant served a term of imprisonment therefor in the State Prison.

That before the commission of the offenses hereinbefore set forth in this information, said defendant, DENNIS COUNCLE McGAUTHA, under the name of Dennis McGautha, was in the District Court of the State of Texas, for the County of Harris, convicted of the crime of ROBBERY BY ASSAULT, a felony, and the judgment of said court against said defendant in said connection was on or about the 16th day of May, 1952, pronounced and rendered and said defendant served a term of imprisonment therefor in the State Prison.

The former convictions herein alleged against said defendant, DENNIS COUNCLE McGAUTHA, are hereby charged against him with respect to each of the counts hereinbefore set forth and by reference the same are hereby made a part of each of said counts.

* * * *

[fol. 6]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES—April 12, 1967

Department No. 100

Present Hon. ROBERT FEINERMAN, Judge

Case No. A219578

[Title Omitted in Printing]

McGautha: Due to a conflict of interest Deputy Public Defender is relieved and C. Lloyd appointed pursuant to Section 987a Penal Code. Smith: Due to a conflict of interest Deputy Public Defender relieved and J. Cochran appointed pursuant to Section 987a Penal Code. Wilkinson: Due to a conflict of interest Deputy Public Defender relieved and A. Bornstein appointed pursuant to 987a Penal Code. McGautha and Wilkinson: Plead "Not Guilty." Trial continued to June 7, 1967 at 9 AM in Department 117. Smith: Motion 995 Penal Code continued to May 3, 1967 at 9 AM in Department 111. Each: Waives time. Each: Remanded.

• • • •

[fol. 9]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES—August 14, 1967

Department No. 117

X CHARLES LLOYD
X J. COCHRAN
X A. BORNSTEIN

Each: Cause is called for trial. Motion of Defendant Smith for severance is granted, and the Court severs cause as to Defendant Smith from Defendants McGautha and Wilkinson. The Court trails cause as to Defendant Smith to conclusion of cause as to Defendants McGautha and Wilkinson. Defendant Smith waives time. Defendant McGautha is arraigned on priors and admits all four priors. By order of the Court, all prospective jurors are sworn to answer regarding qualifications and impaneling commences. By stipulation, juror Maxie Valdivia may be excused. Prospective jurors are admonished and cause is continued to August 15, 1967 at 10:00 A.M. Motion of Defendant McGautha is granted and the Court orders Sheriff to allow Defendant to shave prior to next Court date. Each: Remanded.

* * * *

[fol. 11]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES—August 16, 1967

Department 117

Jury trial is continued from August 15, 1967 with all present as heretofore. Selection of the jury panel continues. On order of the court the following named jurors are impaneled and sworn to try the cause:

Mrs. Janice Walker
Mrs. Rita Braun
Mrs. Agnes Kischell
Mrs. Evelyn Janssen
Mrs. Carol Fogel
Mr. Fred Perez
Mrs. Mildred Harden
Mrs. Harriet S. Grant
Mr. Roderick Haskell
Mrs. Leonard Wain
Mr. Allen Hamblin
Mr. Anthony Thomas

Mrs Nadine Elledge and Mr Donald Merriam are sworn as alternates. All waive reading of the information. Motion of the people, granted, court orders reporter to transcribe daily procee, one original and five duplicates to commence on opening statement, August 17, 1967 at 10:30 AM. Motion of Defendant's, court orders Sheriff to allow bathing priviledges and haircuts for Defendant, said haircuts at Defendant's expense. Jury is admonished. Cause is continued to 10:30 AM on August 17, 1967. Each: Remanded.

* * * *

[fol. 14]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES—August 21, 1967

Department No. 117

Each: Jury trial is continued from August 18, 1967 with all present as before. John Wesley Watkins, Kenneth Chapman, Peter Borck and Kaye Robert Drury are sworn and testify for the People. People's exhibits 21 (2 diagrams), 22 (photo), 23 (photo), 24 (envelope and contents), 25 (envelope and contents), 26 (car registration) marked for identification. Stipulated, People's exhibit 5 may be returned to arresting officer at conclusion of trial. Stipulated that People's exhibit 24 was bullet found in body of deceased. Motion of People, all exhibits marked for identification now received in evidence except #5. People rest. Defendant Wilkinson's exhibit A (diagram) received in evidence. Stipulation of each: Defendant Wilkinson and McGautha, was arrested in Bakersfield on or about March 3, 1967. Defendant Wilkinson rests. Defendant McGautha rests. All rest. Cause argued and continued to August 22, 1967 at 10 AM. Each: Remanded.

* * * *

[fol. 15] TOP

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

[Filed Aug. 23, 1967, William G. Sharp, County Clerk, By J. Chris Williams, Deputy.]

Dept. No. 117

No. A2195

[Title Omitted in Printing]

INSTRUCTIONS GIVEN

Consisting of 46 pages herein

* * * *

[fol. 38] 51. (Re-revised)

DEFENDANT NOT TESTIFYING NO INFERENCE OF GUILT MAY BE DRAWN

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus the decision as to whether he should testify is left to the defendant, acting with the advice and assistance of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

HISTORY

of this instruction shown by check (✓) marks

Requested by People

Requested by Defendant ✓

Given on Court's Motion

Given as Requested ✓

Given as Modified

Refused

Instruction numbers, captions and notes are not parts of the respective instructions, and have not been read to the jury.

/s/ W.B.K.
Judge

* * * *

[fol. 56] 9-A. (Revised)

WHEN PENALTY NOT AN ISSUE—CAPITAL CASE

In determining the issue of guilt or innocence in this case, the subject of penalty or punishment is not to be discussed or considered by you. If you return a verdict of guilty of murder in the first degree, then the matter of penalty or punishment will be considered and determined by the jury in a separate proceeding. If you return a verdict of guilty of [murder in the second degree or of] any lesser offense, the matter of penalty or punishment will be determined by the Court and other governmental agencies.

HISTORY

of this instruction shown by check (✓) marks

Requested by People	✓
Requested by Defendant	
Given on Court's Motion	
Given as Requested	✓
Given as Modified	
Refused	

Instruction numbers, captions and notes are not parts of the respective instructions, and have not been read to the jury.

/s/ W.B.K.
Judge

* * * *

[fol. 72] VERDICTS, GUILT PHASE

Filed August 22, 1967

[Caption Omitted in Printing]

Jury trial is continued from August 21, 1967 with all present as heretofore. On motion of Defendant Wilkinson, Defendant's Exhibit A (Diagram) is received in evidence. All sides rest. The jury is instructed. The Sheriff is sworn. The jury retires to deliberate the cause at 10:40 AM. At 4:15 PM, the jury comes into Court with the following verdict:

TITLE OF COURT AND CAUSE

"We, the Jury in the above entitled action, find the defendant Dennis Councle McGautha, guilty of violation of Section 211 Penal Code, to wit Robberty, as charged in count 1 of the information, and we find the degree to be first."

This 22nd day of August, 1967

MR. ALLEN A HAMBLIN
Foreman

"We, the jury in the above entitled action find the defendant Dennis Councle McGautha, guilty of a violation of Section 211 Penal Code, to wit Robbert as charged in Count 2 of the information, and we find the degree to be first."

This 22nd day of August, 1967

MR. ALLEN A HAMBLIN
Foreman

"We, the jury in the above entitled action, find the defendant Dennis Councle McGautha, guilty of a violation of Section 187 Penal Code, to wit Murder, as charged

in Count 3 of the information, and we find it to be in the first degree."

This 22nd day of August, 1967

MR. ALLEN A HAMBLIN
Foreman

"We, the jury in the above entitled action, find the charge against Dennis Councle McGautha, of being armed at the time of his commission of the offense as contained in Count 1 of the information true."

This 22nd day of August, 1967

MR. ALLEN A HAMBLIN
Foreman

"We, the jury in the above entitled action, find the charge against the defendant Dennis Councle McGautha of being armed at the time of his commission of the offense as contained in Count 2 of the information true."

This 22nd day of August, 1967

MR. ALLEN A HAMBLIN
Foreman

[fol. 73]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Department No. 117

MINUTES—August 22, 1967
(continued)

"We, the jury in the above entitled action, find the defendant William Rodney Wilkinson, guilty of a violation of Section 211 Penal Code, to wit Robbery, as charged in Count 1 of the information, and we find the degree to be first."

This 22nd day of August, 1967

MR. ALLEN A HAMBLIN
Foreman

"We, the jury in the above entitled action, find the defendant William Rodney Wilkinson, guilty of a violation of Section 211 Penal Code, to wit Robbery, as charged in Count 2 of the information, and we find the degree to be first."

This 22nd day of August, 1967

MR. ALLEN A HAMBLIN
Foreman

"We, the jury in the above entitled action, find the defendant William Rodney Wilkinson, guilty of a violation of Section 187 Penal Code, to wit Murder, as charged in count 3 of the information, and we find it to be in the first degree."

This 22nd day of August, 1967

MR. ALLEN A HAMBLIN
Foreman

"We, the jury in the above entitled action, find the charge against the defendant William Rodney Wilkinson, of being armed at the time of his commission of the offense as contained in Count 1 of the information, true."

This 22nd day of August, 1967

MR. ALLEN A HAMBLIN
Foreman

"We, the jury in the above entitled action, find the charge against the defendant William Rodney Wilkinson, of being armed at the time of his commission of the offense as contained in Count 2 of the information, true."

This 22nd day of August, 1967

MR. ALLEN A HAMBLIN
Foreman

Verdicts are read and recorded. Reading as recorded waived. The jury is polled. All answer in the affirmative. All verdicts forms submitted to the jury and instructions are filed. A Probation Officer's report ordered. The jury having returned said verdicts re count 3, the court orders penalty trial to commence August 23, 1967 at 10:00 AM. The jury is discharged for the night. Each: Defendant makes motion for new trial, said motion to be ruled on later, Court states. Each: Remanded.

* * * *

[fol. 74]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Department No. 117

MINUTES—August 23, 1967

The jury having found each defendant "Guilty" as charged, and having found in count 3, Violation of Section 187 Penal Code, to be Murder in the first degree. The Court now orders the penalty phase, by law to commence. Jury trial commences with all present as heretofore. People waive opening statement. Each defendant reserves right to make opening statement. People's Exhibit 27 (Police file, prints, etc) received in evidence. People rest. Defendant Wilkinson makes opening statement. Defendant McGautha reserves opening statement. Edward D Brinner, William R Wilkinson, Iola Henry, Charles Henry Davis, Jr, Richard L Sullivan, Laman Bolling, are sworn and testify for the Defendant Wilkinson. Defendant Wilkinson rests. Defendant McGautha waives opening statement, is sworn and testifies in his own behalf. Jury admonished. Cause continued to August 24, 1967 at 10:00 AM. Each: Remanded.

[fol. 75]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Department No. 117

MINUTES—August 24, 1967

Jury trial is continued from August 23, 1967, with all present as heretofore. Defendant McGautha resumes testimony. Defendant McGautha rests. Defendant Wilkinson rests. People rest. Cause is argued. Jury is instructed. Sheriff is sworn. Jury retires to deliberate the cause at 2:10 pm. The jury comes into court at 4 pm, testimony is read to jury and jury instruction 306.2 is read in open court. The Court orders the jury be locked up over night at 5:15 pm at the Biltmore Hotel. The sheriff is sworn to take the jury and alternate jurors in custody to said hotel. Jury to continued deliberations at 9 am on August 25, 1967. Each: Remanded.

* * * *

[fol. 81] TOP

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

[Filed Aug. 25, 1967, William G. Sharp, County Clerk, By J. Chris Williams, Deputy.]

Dept. No. 117

No. A219578

[Title Omitted in Printing]

INSTRUCTIONS REFUSED

Consisting of 2 pages herein

[fol. 82] 29.1 (New)

DEFINITION OF ADMISSION

A statement made by a defendant other than at his trial may be an admission.

An admission is a statement by a defendant, which by itself is not sufficient to warrant an inference of guilt, but which tends to prove guilt when considered with the rest of the evidence.

You are the exclusive judges as to whether an admission was made by the defendant and if the statement is true in whole or in part. If you should find that such statement is entirely untrue, you must reject it. If you find it is true, in part, you may consider that part which you find to be true.

HISTORY

of this instruction shown by check (✓) marks

Requested by People	✓
Requested by Defendant	
Given on Court's Motion	
Given as Requested	
Given as Modified	
Refused	✓

Instruction numbers, captions and notes are not parts of the respective instructions, and have not been read to the jury.

/s/ W.B.K.
Judge

[fol. 88] 39. (Revised)

EVIDENCE LIMITED TO ONE OF SEVERAL DEFENDANTS

In the trial of this case, certain evidence was admitted as against one of the defendants, but denied admission as against the other.

At the time this evidence was received you were admonished that it could not be considered by you as against the other defendant in deciding his innocence or guilt.

You are again instructed that you must not consider such evidence as against the other defendant.

The guilt or innocence of each defendant must be decided as if he were being tried separately.

HISTORY

of this instruction shown by check (✓) marks

Requested by People	✓
Requested by Defendant	
Given on Court's Motion	
Given as Requested	
Given as Modified	
Refused	✓

Instruction numbers, captions and notes are not parts of the respective instructions, and have not been read to the jury.

/s/ W.B.K.
Judge

[fol. 84] TOP

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

[Filed Aug. 25, 1967, William G. Sharp, County Clerk, By J. Chris Williams, Deputy.]

Dept. No. 117

[Title Omitted in Printing]

INSTRUCTIONS REFUSED WITH EXPLANATION

Consisting of 11 pages herein

[fol. 85] 306.1 (New)

FIRST DEGREE MURDER—PENALTY

Para. 4

The defendants in this case [have] been found guilty of the offense of murder in the first degree, and it is now your duty to determine which of the penalties provided by law should be imposed on each defendant for that offense. In arriving at this determination you should consider all of the evidence received here in court presented by the people and defendants throughout the trial before this jury. You may also consider all of the evidence of the circumstances surrounding the crime, of the each defendant's background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court. However, it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other.

It is the law of this state that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury. If you should fix the penalty as confinement for life, you will so indicate in your verdict. If you should

fix the penalty as death, you will so indicate in your verdict. Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience and absolute discretion. That verdict must express the individual opinion of each juror.

Beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits [fol. 86] the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience and absolute discretion of the jury. In the determination of that matter, if the jury does agree, it must be unanimous as to which of the two penalties is imposed.

HISTORY

of this instruction shown by check (✓) marks

Requested by People ✓

Requested by Defendant

Retyped and given.

Given on Court's Motion

Given as Requested

Given as Modified

Refused ✓

Instruction numbers, captions and notes are not parts of the respective instructions, and have not been read to the jury.

/s/ W.B.K.
Judge

[fol. 87] 306-A. (Revised)

SEPARATE DETERMINATION OF PENALTY OF EACH DEFENDANT

7th

In this case you must decide separately the question of the penalty of each of the two defendants. If you cannot agree upon the penalty to be inflicted on both defendants, but do agree as to the penalty of one of them, you must render a verdict as to the one on which you do agree.

HISTORY

of this instruction shown by check (✓) marks

	Requested by People ✓
Retyped	Requested by Defendant
&	Given on Court's Motion
given	Given as Requested
/s/ W.B.K.	Given as Modified
	Refused ✓

Instruction numbers, captions and notes are not parts of the respective instructions, and have not been read to the jury.

/s/ W.B.K.

Judge

[fol. 88] II. (New)

GENERAL INSTRUCTIONS

Ladies and Gentlemen of the Jury:

It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

Both the People and the defendant have a right to demand, expect, that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

Your verdict must express the individual opinion of each juror.

You are the exclusive judges of the facts and of the effect and value of the evidence. You must determine the facts only from the evidence received in court.

You must not consider as evidence any statement of counsel made during the trial; however, if counsel for the parties have stipulated to any fact, you will regard that fact as being conclusively proved.

As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection.

You must not consider for any purpose any offer of evidence that was rejected, nor any evidence that was stricken out by the court; such matter is to be treated as though you had never heard it.

It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. There is no distinction between direct evidence and circumstantial evidence as a means of proof. Neither is entitled to any greater weight than the other.

[fol. 89] Direct evidence means evidence that directly proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact.

Circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

You are the sole judges of the credibility of the witnesses who have testified in this case. In determining the credibility of a witness you may consider his demeanor while testifying; the character of his testimony; his opportunity and ability to observe, to recollect, or to communicate any matter about which he testifies; his character for honesty or veracity or their opposites; the existence or nonexistence of any bias, interest or motive in the case; or any statement made by him that is inconsistent with his testimony.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence, you shall believe that the probability of truth favors his testimony in other particulars.

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number or other evidence, which appeals to your mind with more convincing force. Testimony given by one witness whom you believe is sufficient for the proof of any fact.

[fol. 90] [Duly qualified experts may give their opinions on questions in controversy at a trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert. You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.]

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous.

HISTORY

of this instruction shown by check (✓) marks

	Requested by People	✓
Given	Requested by Defendant	
in part	Given on Court's Motion	
on typed	Given as Requested	
instruction	Given as Modified	
	Refused	✓

Instruction numbers, captions and notes are not parts of the respective instructions, and have not been read to the jury.

/s/ W.B.K.
Judge

[fol. 91]

ROBBERY

210-A. DEGREE OF ROBBERY

210-B. (Revised)

DANGEROUS OR DEADLY WEAPON—DEFINITION

Robbery is the felonious taking of personal property of any value in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear,

——oo——

210-A.

Robbery which is perpetrated by torture or by a person or by two or more persons any one of them being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree.

If you should find the defendant guilty of robbery, it will be your duty to determine the degree thereof and to state that degree in your verdict.

——oo——

210-B. (Revised)

A dangerous or deadly weapon means any weapon, instrument or object that is capable of being used to inflict death or great bodily injury. It is not necessary that such weapon be in fact used nor visible.

HISTORY

of this instruction shown by check (✓) marks

	Requested by People	✓
Given	Requested by Defendant	
in	Given on Court's Motion	
Guilt	Given as Requested	
Phase	Given as Modified	
	Refused	✓

Instruction numbers, captions and notes are not parts of the respective instructions, and have not been read to the jury.

/s/ W.B.K.
Judge

[fol. 92] 308-B. (Revised)

INVOLUNTARY MANSLAUGHTER

There are two classes of involuntary manslaughter:

(1) Involuntary manslaughter is the unlawful killing of a human being without malice aforethought during the commission of a misdemeanor which is inherently dangerous to human life or safety.

(2) Involuntary manslaughter is the unlawful killing of a human being without malice aforethought in the commission of an act ordinarily lawful which involves a high degree of risk of death or great bodily harm, without due caution and circumspection.

HISTORY

of this instruction shown by check (✓) marks

Requested by People	✓
Requested by Defendant	
Given on Court's Motion	
Given as Requested	
Given as Modified	
Refused	✓

Instruction numbers, captions and notes are not parts of the respective instructions, and have not been read to the jury.

/s/ W.B.K.
Judge

[fol. 93] 308. (Revised)

MANSLAUGHTER—VOLUNTARY AND INVOLUNTARY

Manslaughter is the unlawful killing of a human being, without malice aforethought. It is not divided into degrees but is of two kinds, namely, voluntary manslaughter and involuntary manslaughter.

HISTORY

of this instruction shown by check (✓) marks

Requested by People ✓

Requested by Defendant

Given on Court's Motion

Given as Requested

Given as Modified

Refused ✓

Instruction numbers, captions and notes are not parts of the respective instructions, and have not been read to the jury.

/s/ W.B.K.
Judge

[fol. 94] 308-A. (Revised)

VOLUNTARY MANSLAUGHTER

Voluntary manslaughter is the intentional and unlawful killing of a human being without malice aforethought upon a sudden quarrel or heat of passion without deliberation or premeditation.

HISTORY

of this instruction shown by check (✓) marks

Requested by People	✓
Requested by Defendant	
Given on Court's Motion	
Given as Requested	✓
Given as Modified	
Refused	✓

Instruction numbers, captions and notes are not parts of the respective instructions, and have not been read to the jury.

/s/ W.B.K.
Judge

[fol. 95] 306.1(a) (New)

EVIDENCE OF OTHER CRIMES

Evidence of other crimes alleged to have been committed by the defendant[s] may not be considered as evidence in aggravation unless proved beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, that such other crime [crimes] has [have] been committed by the defendant[s].

HISTORY

of this instruction shown by check (✓) marks

	Requested by People ✓
Given but	Requested by Defendant
retyped into	Given on Court's Motion
one instruction	Given as Requested
/s/ W.B.K.	Given as Modified ✓
	Refused ✓

Instruction numbers, captions and notes are not parts of the respective instructions, and have not been read to the jury.

/s/ W.B.K.
Judge

• • • •

[fol. 98] VERDICTS, PENALTY PHASE

Filed August 25, 1967

[Caption Omitted in Printing]

Jury trial, penalty phase continued from August 24, 1967. Jury returns to deliberation at 9 am. On motion of Defendant Wilkinson, Attorney E. Broady to sit in for Attorney Bornstein for jury instructions only. Jury instructed. The sheriff is sworn. The jury retires to deliberate the cause at 10:10 am. The jury comes into court at 2:45 pm for further reading of testimony and then retires to deliberate the cause at 2:50 pm. Jury returns into Court at 3:35 pm for further reading of testimony and returns to deliberations at 4 pm. At 4:45 pm, the jury comes into court with the following verdicts:

TITLE OF COURT AND CAUSE

"We the jury in the above entitled action, having found the defendant, Dennis Councle McGautha, guilty of murder in violation of Section 187 Penal Code, a felony, and having found it to be murder in the first degree, as charged in Count III of the information, now fix the penalty, for said offense at death.

This 25th day of August 1967.

ALLEN A. HAMBLIN
Foreman

"We, the jury in the above entitled action, having found the defendant William Rodney Wilkinson guilty of murder in violation of Section 187 Penal Code, a felony, and having found it to be murder in the first degree as charged in Count III of the information, now fix the penalty for said offense at life imprisonment."

This 25th day of August, 1967

ALLEN A. HAMBLIN
Foreman

The verdicts are read and recorded. Reading as recorded is waived. The jury is polled as to each defendant on said verdicts. All answer in the affirmative. The jury

is discharged. All Exhibits and verdicts and jury instructions submitted to the jury are returned and filed away. Each: Time waived. A Probation Officer's report is ordered. Probation and sentence hearing set for September 15, 1967, 9 am. Each: Remanded.

* * * *

[fol. 100] JUDGMENTS

WILKINSON, Filed September 15, 1967

[Caption Omitted in Printing]

Motion for new trial is denied. Sentenced as indicated. Count 1 211 Penal Code, First Degree. Armed Counts 2 211 Penal Code First Degree armed and Count 3 187 Penal Code First Degree. Ordered merged for purpose of sentence. Sentenced as indicated on said counts. All sentences to run concurrently, sentenced to life imprisonment on Counts 2 and 3. Defendant files notice of appeal of Judgement in Propria Persona.

Whereas the said defendant having been duly found guilty in this court of the crime of ROBBERY (Sec 211 PC), a felony, as charged in each of Counts 1 and 2 of the information, which the Jury found to be Robbery of the first degree and that defendant was armed as alleged; MURDER (Sec 187 PC), a felony, as charged in Count 3, which the Jury found to be Murder of the first degree; counts 2 and 3 having been merged for purposes of sentence

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term of his natural life as to Counts 2 and 3 and for the term prescribed by law as to Count 1. Sentences as to Counts 1, 2 and 3 are ordered to run CONCURRENTLY with each other.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

[fol. 101]

McGAUTHA, Filed September 29, 1967

[Caption Omitted in Printing]

Motion for new trial denied. Court states he has read report. Motion for reduction of sentence is denied. Probation denied. Sentenced as indicated. Motion of defendant, Attorney Lloyd is relieved. Defendant files Notice of Appeal of Judgment in propria persona. Court orders Counts II, 211 Penal Code 1st degree and Count III, 187 Penal Code, Murder, merged for purpose of sentence. Court orders sentence on Count III, 187 Penal Code at death penalty.

Whereas the said defendant having been duly found guilty in this court of the crime of ROBBERY (Sec 211 PC), a felony, as charged in each of Counts 1 and 2 of the information, which the Jury found to be Robbery of the first degree and that defendant was armed as alleged; admitted prior convictions as alleged, to wit: Theft over $50, a felony, District Court of the State of Texas, Dallas County, October 26, 1943; Robbery, a felony, District Court of the State of Texas, Dallas County, October 26, 1943; Murder Without Malice, a felony, District Court of the State of Texas, Harris County, November 23, 1943; Robbery by Assault, a felony, District Court of the State of Texas, Harris County, May 16, 1952 and served a term in the State Prison for each prior conviction; counts 2 and 3 having been merged for purposes of sentence

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law, on said counts.

Sentences as to Counts 1 and 3 are ordered to run CONCURRENTLY with each other.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

[fol. 102] [Caption Omitted in Printing]

Motion for new trial denied. Court states he has read report. Motion for reduction of sentence is denied. Probation denied. Sentenced as indicated. Motion of defendant, Attorney Lloyd is relieved. Defendant file Notice of Appeal of Judgment in propria persona Court orders Counts II, 211 Penal Code 1st degree and Count III, 187 Penal Code Murder, merged for purpose of sentence. Court orders sentence on Count III, 187 Penal Code at death penalty.

Whereas the said defendant having been duly found guilty in this court of the crime of MURDER (Sec 187 PC), a felony, as charged in Count 3 of the information, which the Jury found to be Murder of the first degree and fixed the penalty at death; admitted prior convictions as alleged, to wit: Theft over $50, a felony, District Court of the State of Texas, Dallas County, October 26, 1943; Robbery, a felony, District Court of the State of Texas, Dallas County, October 26, 1943; Murder Without Malice, a felony, District Court of the State of Texas, Harris County, November 23, 1948 and Robbery by Assault, a felony, District Court of the State of Texas, Harris County, May 16, 1952 and served a term in the State Prison for each prior conviction

It is now the judgment and sentence of this Court for the offense of Murder in the first degree, you suffer the death penalty, and that said penalty be inflicted within the walls of the State Penitentiary at San Quentin, California, in the manner and means as prescribed by law and you are remanded to the care, custody and control of the Sheriff of Los Angeles County, to be by him delivered within ten days from date hereof to the Warden of the State Penitentiary at San Quentin, for execution of the sentence, and to be held by him pending final determination of the appeal in this matter, which is automatic.

* * * *

PROCEEDINGS IN CHAMBERS REGARDING PRIOR CONVICTIONS

[fol. 25]

LOS ANGELES, CALIFORNIA, MONDAY AUGUST 14, 1967, 10:30 A.M.

—oOo—

(The following proceedings were had in chambers:)

THE COURT: Your name is Dennis Councle McGautha; is that correct?

DEFENDANT McGAUTHA: Yes.

THE COURT: And your name is William Rodney Wilkinson; is that correct?

DEFENDANT WILKINSON: Right.

THE COURT: All right, I will have the record reflect, now, the appearance here in chambers of both defendants and the presence of all counsel in this matter, Mr. Lloyd, Mr. Cochran, and Mr. Bornstein.

There is a third defendant named in this Information. That is Fannie Lue Smith, the female defendant. Due to some difficulty in transportation she has not as yet arrived here in the Brunswig Building and she is en route.

We do, however, at this time, have our jury panel present in the courtroom and, if course, the record should reflect, if it does not, that this entire proceeding is being conducted in chambers outside of the presence of the jury.

My though is at this time, in light of our prior conversation that there is to be a motion on behalf of defendant Fannie Lue Smith, for a severance, which is to [fol. 26] be unopposed by the People, that we can go ahead at this time and at least start a selection of the jury, and I will hear the motion, and in light of the fact that there will be no opposition to it by the People and, I understand, no opposition from either defendant McGautha or Wilkinson, I can hear that matter and grant it and we can go ahead and use the time, if that is agreeable with the People?

MISS OBERA: Yes, your Honor.

THE COURT: And is that agreeable with defendant McGautha?

MR. LLOYD: Yes, it is.

THE COURT: Is that correct, Mr. McGautha?

DEFENDANT McGAUTHA: Yes.

THE COURT: Is that agreeable with defendant Wilkinson?

DEFENDANT WILKINSON: Yes.

MR. BORNSTEIN: Yes.

THE COURT: Is that agreeable with you, Mr. Cochran, on behalf of Fannie Lue Smith?

MR. COCHRAN: Certainly, your Honor. It certainly is.

THE COURT: All right, then we will proceed on this matter.

I will grant the motion at the time it is made to sever Fannie Lue Smith from the trial, and the under-
[fol. 27] standing is that her matter will then be tried at the conclusion of this trial.

The other matter to be taken up here in chambers, at this time, is, in addition to the three counts set forth in the Information, we have an allegation in the Information as to defendant Dennis McGautha of one, two, three, four prior felony convictions, and it is my understanding, Mr. Lloyd, that you desire at this time to have defendant McGautha admit those priors outside the presence of the jury.

MR. LLOYD: That is correct, your Honor.

You do admit the priors, don't you, Mr. McGautha?

DEFENDANT McGAUTHA: Yes, I do.

MR. LLOYD: You recall I discussed that with you and you want to admit them here so the jury doesn't hear them; okay?

DEFENDANT McGAUTHA: Yes.

THE COURT: Would you arraign the defendant on the priors, then, Miss Obera?

MISS OBERA: Mr. McGautha, it is alleged that before the commission of the offenses with which you are now charged you were, under the name of Dennis McGautha, in the District Court of the State of Texas, for the County of Dallas, convicted of the crime of theft, over fifty dollars, a felony, and judgment of the Court

[fol. 28] was rendered on or about the 26th day of October, 1943, and you served a term of imprisonment thereof in the state prison.

Do you admit or deny that?

DEFENDANT McGAUTHA: I admit this.

MISS OBERA: It is further alleged that before the commission of the offenses alleged in this Information you were, under the name of Dennis McGautha, in the District Court of the State of Texas, for the County of Dallas, convicted of the crime of robbery, a felony, and the judgment of the Court was rendered on or about the 26th day of October, 1943, and you received a term of imprisonment in the state prison for that crime.

Do you admit or deny that?

DEFENDANT McGAUTHA: I admit it.

MISS OBERA: It is further alleged that before the commission of the offenses charged in this Information you were, under the name of Dennis McGautha, in the District Court of the State of Texas, for the County of Harris, convicted of the crime of murder without malice, a felony. The judgment of the Court was rendered on or about the 23rd day of November, 1948, and you served a term of imprisonment in the state prison for that crime.

Do you admit or deny the allegation?

DEFENDANT McGAUTHA: Explanation, please. It [fol. 29] was not murder without malice, it was manslaughter.

MR. LLOYD: All right, murder without malice.

Mr. McGautha, I would advise you to admit it as read; all right?

DEFENDANT McGAUTHA: I admit it.

MISS OBERA: It is further alleged that before the commission of the offenses alleged in the Information you were, under the name of Dennis McGautha, in the District Court of the State of Texas, for the County of Harris convicted of the crime of robbery by assault, a felony, and the judgment was rendered on or about the 16th day of May, 1952, and you served a term of imprisonment in the state prison for that crime.

Do you admit or deny that allegation?

DEFENDANT McGAUTHA: I admit it.

THE COURT: All right, the record will reflect now that the defendant has admitted all the priors outside of the presence of the jury.

All right, we will proceed with the selection of the jury.

(Whereupon, the following proceedings were had in open court within the hearing of the prospective jurors:)

THE COURT: This case of People vs. Dennis McGautha and William Rodney Wilkinson.

MR. LLOYD: Defendant McGautha is present and ready, your Honor.

* * * *

[fol. 87]

PROSPECTIVE JUROR KISCHELL
VOIR DIRE EXAMINATION

BY MR. BORNSTEIN:

Q Mrs. Kischell?

A Yes.

Q May I ask you what your business or occupation is; housewife?

A Housewife.

Q And is there a Mr. Kischell?

A No, there isn't.

[fol. 88] Q Have you been the victim of a robbery or burglary?

A No.

Q Have any of your friends or neighbors?

A No.

Q Have you sat on any prior cases before involving persons charged with robbery or burglary?

A Yes. Yes, in '58 I just remembered I sat on one that was a robbery.

Q This was on a prior tour of duty as a juror?

A Yes.

Q Was this in Los Angeles County?

A Yes.

Q Now, you understand that the mere fact that you have sat on a prior case that doesn't make any difference as far as this case?

A Oh, no.

Q You understand that as far as this case is concerned it is like that piece of paper there; right?

A That's right.

Q Now, let me ask you this: suppose you are picked as one of the jurors, and you are in the jury room, and you have had a little prior experience sitting as a juror, you wouldn't try to, in a sense, run the situation; would you?

A Definitely not.

[fol. 89] Q You understand that each defendant is entitled to each one of your individual opinions as to their innocence of guilt; you understand that?

A That's right.

Q And you understand that each defendant would be entitled to your individual opinion, assuming we got to the stage as to how he should be punished?

A Yes.

Q And that you would discuss the matter with the other jurors; is that correct?

A That's right.

Q But that if you have reached a conclusion and you feel it is a proper one, you would have a right to your opinion?

A Yes.

Q You understand that? You understand that in a sense you are sitting as a judge, just as Judge Keene sits. He judges the situation as far as the law and the procedure and how he carries on the trial, but as far as the facts and the opinions and conclusions which are drawn from facts, that you are the judge; you understand this, do you not?

A That's right.

Q You understand, I'm sure, I don't have to repeat this, but I am going to ask each of you again the awesome responsibility that you have in a case of this [fol. 90] magnitude; do you understand that?

A I do.

Q Do you understand that two people's lives, in a sense, are in your hands?

A That's right.

Q And that you are going to take and judge each of these persons as individuals; is that right?

A Yes.

Q Now, assuming that we have reached the stage of penalty, again, you understand that you are going to be the person who fixes it, in a sense, the punishment, assuming we reach the penalty stage of the murder prosecution, and that the law, in a sense, gives you very few guidelines. That in a sense it says you decide it based upon the facts that have been presented to you and whatever other competent evidence is before you on what should happen to these persons. Do you feel you could do this?

A I think so.

Q And, again, I will ask the question, the fact that a person is of a different racial origin, that this is the United States of America and it can't make any difference; you understand that; don't you?

A That's right.

You know that even though there have been problems with certain groups that have come about, that [fol. 91] this can't color your thinking. You must decide on these persons as human beings and individuals; you understand that, don't you?

A Yes.

Q And none of the prejudices that all of us have to some degree, or none of these sympathies that all of us have to some degree can enter into your verdicts; you understand that?

A Yes.

Q You must decide upon the facts and the law and nothing else?

A Yes.

Q Is there any reason why you feel that you cannot be a fair and impartial juror sitting on this case?

A No, I can't think of any.

Q If you do, you will let us know; right?

A Yes.

* * * *

[fol. 148]

PROSPECTIVE JUROR KISCHELL
VOIR DIRE EXAMINATION

BY MISS OBERA:

Q Mrs. Kischell, you have not been a juror before either; have you?

A Yes, I have.

Q Oh, you have. And was that a criminal case?

A Well, a robbery. It was criminal.

Q That's right. Did this occur on your earlier tour?

[fol. 149] A Yes.

Q We will also be involved in robberies here, as you heard. I take it you would not let anything that happened in the earlier case affect your judgment here?

A No, it would be entirely different.

Q Incidentally, it may come to your attention during the course of this trial, in addition to the two defendants who are on trial, there is another person who seems to be involved in these robberies throughout. Now will that fact, do you think, affect your verdict in this case in any way?

A I don't know.

Q Well, let's assume that when you start hearing evidence it comes to your attention there is another person and this other person's name keeps coming up and then identification keeps coming up throughout the case and that person is not before you for trial. All right, now, you understand each defendant is entitled to your individual verdict; do you not?

A That's right.

Q Now, can you determine the guilt or innocence of these defendants individually without reference to some third person who is not before the Court?

A I believe so.

Q Each person feels that he would answer that same way and you wouldn't speculate about why that other [fol. 150] person isn't here and you wouldn't speculate if you get to the penalty phase about, "Why should I write in a death penalty for either of these persons when I know that somebody else is involved and that person isn't here before me?"

Do you think you would be tempted to speculate about these matters?

A I don't believe so.

Q If you find as you go along that you might be, would you let us know?

A I certainly would.

* * * *

[fol. 126] PROSPECTIVE JUROR PEREZ
VOIR DIRE EXAMINATION

BY MR. BORNSTEIN:

Q Mr. Perez, may I ask what your business or occupation is?

A Yes, I am a dealer and collector of pre-Columbian art.

Q Of all the jurors I have inquired of you do have the most unusual occupation I have ever run into.

[fol. 127] In your occupation such as this, have you ever been the victim or do you know of any of your associates that have been victims of a burglary or robbery?

A No.

Q And have you sat on any prior cases?

A No, I have not.

Q Do you have any friends or relatives who are members of any law enforcement agency?

A No, I have not.

Q Now, if you are chosen as a juror to sit in this particular proceeding you will use your own intelligence and you will analyze the evidence as you think it should be analyzed; is that correct?

A That's right.

Q You heard my little statement as far as the red light situation?

A Yes.

Q And the fact that some of the jurors may say, "Well, I think that the policeman saw what he says he saw," and others may say, "Well, I think the man came to a full stop and the policeman just wasn't paying too much attention," reasonable people can disagree over in-

terpretations of reasonable evidence; you understand that?

A Yes, I do.

[fol. 128] Q The fact that there may be a disagreement over interpretations between all you persons who would be in the jury room, this can be reasonable under the circumstances; you understand that?

A Yes.

Q You understand, also, that it would be your duty as a juror to fully discuss any of these things that you disagree upon and not just sit there and say, "I don't like the way he is talking and I will just go and take my position." You understand that this would be quite unfair to all parties?

A Yes.

Q You understand that it is an expensive proposition for the state to pay you and pay the court and everybody else and that all of us, in a sense, want a verdict, but that the verdict that we want must be based on the evidence and the law and nothing else; you understand that?

A Correct.

Q And, therefore, if you accept a position that would be contrary to what some of the other jurors believe or think, you are not going to abandon your position just to go along with the majority, say, would you? Would you abandon your position just to go along?

A No, I would not.

Q Even though you may think, "Gee, I hate to waste [fol. 129] the time and I hate to see all these people waste their time," you are entitled to your opinion and that is of primary importance; you understand that?

A That's right.

Q Now, with reference to the charges, again, I will repeat, you understand that they are individual charges, they are individual sets of circumstances that you must make individual verdicts on?

A That's right.

Q And the same thing, assuming that you get to the penalty phase, you are going to run into the same situation there. You are going to use your mind to analyze the evidence as you think it should be analyzed

and you are going to discuss it but you are going to arrive at your verdict as to what you believe it should be?

A That is correct.

MR. BORNSTEIN: Thank you.

• • • •

[fol. 156] PROSPECTIVE JUROR PEREZ
VOIR DIRE EXAMINATION

BY MISS OBERA:

Q Mr. Perez, I will ask you the same questions which I have asked the other prospective jurors. Do you think of any question you would answer differently?

A No.

• • • •

[fol. 133] PROSPECTIVE JUROR THOMAS
VOIR DIRE EXAMINATION

BY MR. BORNSTEIN:

Q Mr. Thomas, I'm sure you remember the questions of yesterday and I am going to be rather brief, if I may.

In my questions that I asked of the other jurors are there any answers that you would have answered in a different manner?

A Substantially, no.

Q You heard the statements that I made with reference to the various charges and you understand that [fol. 134] it would be your duty to take each charge as an individual matter; is that correct?

A Yes, sir.

Q And you also heard the questions and the answers with reference to the individual personalities involved and, again, it would be your duty to take each of the defendants as an individual human being and judge him alone, not in relationship to the other, if the proper time comes; you understand that, do you not?

A Yes, sir.

Q Is there anything about this matter or the proceedings that are before the court today that would

cause you to feel that you could not serve as a fair and impartial juror?

A No.

Q May I ask what your business or occupation is?

A Immediately prior to being called for jury I graduated from the commercial airline ground training course and I will be so employed when I am through.

Q And may I ask what your occupation was prior to that?

A I have been in the service, Army.

Q And did you have any connection with, or do you have any friends that are connected with any police authorities or prosecution agencies?

[fol. 135] A No, sir.

Q And as far as the penalty, the death penalty issue, you have an open mind on this? You are not an advocate as to the abolition, or you will not try to enforce it heavier; is that correct?

A Not consciously, no.

Q And if you discover sometime along the line that something crops up in your thoughts, you are going to try to put them out of your mind which would make you an advocate rather than a judge; is that correct?

A Yes, sir.

MR. BORNSTEIN: Pass for cause, your Honor.

* * * *

[fol. 157] PROSPECTIVE JUROR THOMAS
VOIR DIRE EXAMINATION

BY MISS OBERA:

Q And, Mr. Thomas, I will ask you the same questions which I have asked the other prospective jurors and ask you if you can think of any question you would answer differently?

A No.

MISS OBERA: Has anybody seated in the jury box ever been present when a jury has returned a penalty of death? Anybody?

All right, now the remarks I am going to make right now are to prepare you for a time that you are

totally unfamiliar with, and if after consideration of what I say you feel that you should not serve on this case don't hesitate to let us know.

I want you to think, now, we have passed the determination of guilt or innocence to a time about ten days from now, and at that time maybe the atmosphere in the courtroom will be totally different. It will probably be very tense and there may very well be relatives and friends of the defendants here in the courtroom, and there may very well be tears and other emotional outbursts on the part of those friends and relatives, and those two defendants will be sitting there [fol. 158] in the courtroom waiting for your verdict. And when you come in the courtroom, if you are bringing in a death penalty, the clerk is going to read that penalty in open court then you will be asked, each of you, if that is your verdict.

Now, if it comes down to that, Mr. Taylor, do you think that you could answer yes?

PROSPECTIVE JUROR TAYLOR: Yes.

MISS OBERA: And how about you, Mr. Stout?

PROSPECTIVE JUROR STOUT: Yes.

MISS OBERA: And, Mrs. Terrile?

PROSPECTIVE JUROR TERRILE: Yes.

MISS OBERA: Mr. Loop?

PROSPECTIVE JUROR LOOP: Yes.

MISS OBERA: Mrs. Kischell?

PROSPECTIVE JUROR KISCHELL: Yes.

MISS OBERA: Mrs. Gripkey?

PROSPECTIVE JUROR GRIPKEY: Yes.

MISS OBERA: Mr. Thomas?

PROSPECTIVE JUROR THOMAS: Yes.

MISS OBERA: Mr. Perez?

PROSPECTIVE JUROR PEREZ: Yes.

MISS OBERA: Mr. Hondrick?

ROSPECTIVE JUROR HONDRICK: Yes.

MISS OBERA: Mr. Hunt?

PROSPECTIVE JUROR HUNT: I believe so.

[fol. 159] MISS OBERA: Mr. Kuretich?

PROSPECTIVE JUROR KURETICH: Yes.

MISS OBERA: Mr. Morrison?

PROSPECTIVE JUROR MORRISON: Yes.
MISS OBERA: Pass for cause.

* * * *

[fol. 238] THE CLERK: Mrs. Evelyn G. Janssen, J-a-n-s-s-e-n.

PROSPECTIVE JUROR JANSSEN
VOIR DIRE EXAMINATION

BY THE COURT:

Q Mrs. Janssen, have you been able to hear the proceedings as they have gone on thus far?
A Yes, sir.
Q Calling your attention, then, first, to the nature of this litigation, do you know of any reason why you could not sit on this case if called upon to do so?
A No, I do not.
Q Do you know, Mrs. Janssen, any of the participants to the litigation?
A No, I don't.
Q Do you know anything about it other than what you heard me state to the court what the charges are?
A None.
Q You were able to hear my statements to the other jurors as to the nature of the proceedings; is that correct?
A Yes, I did.
[fol. 239] Q And you understand that; is that right?
A Yes, sir.
Q You heard my questions and counsels' questions directed to the other prospective jurors as well; is that right?
A Yes, sir.
Q As you heard those questions, and heard your fellow jurors answer and applied those questions to yourself, did they suggest to you any reason why you could not sit on this case?
A None whatsoever.
Q Did they suggest any type of personal information which you would like to advise counsel of at this time?

A No, sir.

Q I take it, then, that you have not, for example, been a victim of a robbery; is that right?

A No, I haven't.

Q You, I take it, that you are not—you do not have any members of your family or close friends that are members of law enforcement agencies?

A That is right.

Q You agree, then, Mrs. Janssen, in this case that you will take the evidence from one source and one source only and that is here in the courtroom as it is received during the course of the trial?

[fol. 240] A Yes, sir.

Q You further agree that you will follow the law as I shall state it to you at the conclusion of the case; is that right?

A Yes, sir.

Q I take it that you do not belong to any organization that advocates the retention of or the abolition of the death penalty in the State of California; is that right?

A That is right.

THE COURT: Mr. Lloyd, you may inquire for cause.

MR. LLOYD: Pass for cause, your Honor.

THE COURT: Thank you, Mr. Lloyd.

Mr. Bornstein?

VOIR DIRE EXAMINATION

BY MR. BORNSTEIN:

Q Mrs. Janssen, may I ask what Mr. Janssen does?

A He is a foreman for Aerojet General in Downey.

Q And you are a housewife?

A Yes.

Q Have you sat on any prior juries involving criminal cases?

A Yes, one small criminal case on narcotics three [fol. 241] years ago in March.

Q But I am sure it wasn't a small case because it is just as important to that defendant.

A That is correct.

Q And the fact that you have had prior experience would make no difference in this case; is that correct?

A That's right.

Q And you are going to have an open mind to all the evidence that will be presented to you here; is that correct?

A Yes, sir.

Q I just sort of hate to keep repeating myself but I'm sure you realize the seriousness of what is going on here?

A Yes, sir.

Q And you can appreciate, though, even though it may be boring and time consuming, that we have to do what we feel is right; you understand that?

A That's right.

Q The fact that we are taking up time, I'm sure you don't—you realize that it is not arbitrary or capricious, we are trying to, all of us, to do the right thing?

A That's right.

Q And the fact that we have asked certain people [fol. 242) to step down for what appears to be no apparent reason doesn't cause you to feel that you would not be fair to everybody concerned; is that correct?

A That is correct.

Q It reminds me of a story once when a court reporter friend of mine was sitting in a case and the attorney asked the young lady to step down and the reporter asked him afterwards, "How come you asked that pretty young lady to step down?" He said, "It reminded me of my first wife."

So you see, we can listen to our hunches. We do what we have to do, nothing personal. I know you realize that; is that correct?

A I realize that.

Q Now, the fact that we have spoken about the bifurcated or double proceedings that may or may not happen in this particular case, you understand that because we have discussed it does not mean that we have formed any opinions, or that we are trying to give you

any opinions as to what you should or should not do; you understand that?

A I realize that.

Q The fact that we say, "Well, if it gets to the second stage," we are not presenting to you any factual evidence or any facts or any inferences from what we are saying to you that, "Well, it will get to the second [fol. 243] stage." You understand that; do you not?

A Yes, sir.

Q We are merely questioning you because we have no other opportunity at a later time to ask you these questions; correct?

A Yes.

Q And the fact that we sort of ask you these questions, you understand what we are getting at, and if anything is different you are going to tell us; is that correct?

A I will.

Q And is there anything about the proceedings that have happened so far to cause you to feel that you cannot be fair to all parties concerned?

A No, sir.

Q Is there anything that you want to bring up or discuss with me at this stage where it would have some bearing on your being a fair and impartial juror?

A Nothing I can think of.

Q There is no reason as you sit here now as to why you feel you could not do your job right; is that correct?

A That's right.

MR. BORNSTEIN: Thank you very much.

Pass for cause, your Honor.

THE COURT: Thank you, Mr. Bornstein.

[fol. 244] Miss Obera?

VOIR DIRE EXAMINATION

BY MISS OBERA:

Q Mrs. Janssen, do you have any religious beliefs which you think might make it impossible for you to render a death penalty verdict in any case?

A No, ma'am.

Q You know, sometimes when we are here in the courtroom, we assume certain roles. We think of ourselves as jurors and maybe we haven't considered all of the other things that enter into our life which we will have to face when we leave the courtroom, and you might go home and start thinking about it and say, "Well, you know, I said I didn't have any conscientious scruples, and I don't, but now that I think about it, it wouldn't go alone with the ideas of my church," something like that. You don't have any feelings like that?

A No.

Q When you were a juror before, that was some time ago; was it not?

A Well, I was—I sat on a civil case just a week and a half ago, but the criminal case was three years ago in March.

[fol. 245] Q Did you sit on that civil case with any of the other ladies and gentlemen who are seated here in the jury box?

A No.

Q You don't know any of these people?

A No.

Q And it doesn't offend you when one side or the other excuses somebody; does it?

A No, it doesn't.

Q And if you yourself were excused, you would not consider that a reflection upon your ability to serve as a juror; would you?

A Certainly not.

Q We have talked quite a bit about penalty, and we have skipped over those qualifications which relate to the determination of guilt or innocence to a certain degree.

Now, do you recall all these questions I asked about giving witnesses immunity, by a person not being a trigger man and still being subject to prosecution for murder, those questions? Do you recall those?

A Yes, I recall those.

Q Did you answer those to yourself?

A Yes, I did.

Q And did you think of any question which you would answer differently from what other juror an-
[fol. 246] swered those questions?
A No, I didn't.
Q As far as you know at this time there is no reason why you could not sit as a juror in this case?
A None whatsoever.
Q And you are willing to undertake all the responsibility which goes with being a juror in this kind of a case?
A Yes.
Q And you will answer to your own conscience for your verdict?
A Definitely.
Q And you don't have to answer to your husband or to your neighbors?
A No.
Q And you feel that you are willing—You understand that, now, I am speaking about the death penalty again. That if a verdict of death is returned in this case it will be your doing?
A Yes, I realize that.
Q And you nevertheless are willing to undertake the responsibility?
A Yes, I am.
Q You would not find it easy?
A No.
MISS OBERA: Thank you. Pass for cause.

* * * *

[fol. 262] THE CLERK: Leonard Wain, W-a-i-n.

PROSPECTIVE JUROR WAIN
VOIR DIRE EXAMINATION

BY THE COURT:

Q Mr. Wain, having followed the procedures thus far from your vantage point in the back of the courtroom, as you take your seat now in the jury box do you know of any reason why you could not sit on this type of a case?

A No.

Q Have you had occasion, Mr. Wain, to serve as a juror before?

A No.

Q This is your first case?

A Yes.

Q I take it, then, that you do not know any of the participants to the litigation; is that correct?

A That is correct.

Q You understood, did you not, my statement to the jurors as to the nature of the pleading known as the [fol. 263] Information, and the three counts in the Information, two counts of robbery and one count of murder; you understood that?

A Yes.

Q You understood what I told the jurors what the word information was; did you not?

A Yes, sir.

Q I stress that because in one recent case, after going through all of this, I received a note from the jurors asking me what the word information meant, so I think it was a legitimate question and an oversight on my part.

So, once again, I state that an Information is the name of a pleading which we give to certain criminal cases, and that is what the case is based upon.

You heard me when I stated to the other jurors that the defendants, and each of them, have entered a plea of not guilty to these charges.

A jury trial has been agreed upon and that is why we are here; do you understand that?

A Yes.

Q You further understand that the People having filed these charges have the burden of proof in a criminal case, and that is the burden of proving the case, if it is capable of proof, beyond a reasonable doubt, and that these defendants, and both of them, are presumed to be [fol. 264] innocent until the contrary is proved; you appreciate that?

A Yes.

Q I take it, then, Mr. Wain, that you will decide this case based upon the evidence as it is received here in court during the course of trial and based upon the law as it will be stated to you; is that right?

A Yes.

Q I take it, then, that you do not belong to any organization that advocates the abolition or retention of the death penalty in the State of California; is that right?

A That is correct.

Q And you appreciate the fact that our legislature in their wisdom has seen fit to leave the decision as to the proper penalty in a case where the verdict is murder in the first degree to the jury and that the legislature has seen fit to impose two alternative punishments, one, death, or, life imprisonment, and they leave that sole and exclusive decision to the jury; you understand that?

A Yes.

Q You do not entertain any feeling about one type of penalty over the other that would preclude you from rendering a penalty, say, for example, of death in a [fol. 265] proper case; is that right?

A That is correct.

THE COURT: Thank you, Mr. Wain.

Mr. Lloyd, you may inquire of this juror for cause.

MR. LLOYD: I will pass for cause.

Thank you, your Honor.

THE COURT: Thank you, Mr. Lloyd.

Mr. Bornstein?

VOIR DIRE EXAMINATION

BY MR. BORNSTEIN:

Q Mr. Wain, may I ask you your business or occupation, sir?

A I am a salesman.

Q And what type of product are you involved in selling?

A I sell women's clothing.

Q You deal with retail or wholesale levels?

A Retail.

Q And the fact that you deal with retail levels of outlets, have you ever been involved with persons that you know of that have been victims of robberies or burglaries?

A No.

[fol. 266] Q Is there anything about the nature of the charges, the seriousness of the nature of the charges, that would cause you to feel that you would have a problem in this case?

A No.

Q With reference to the term death penalty, is there anything about that that brings anything to mind that you would want to discuss at this time?

A No.

Q Have you discussed it with other persons?

A Several years ago a controversy came up.

Q Over Carroll Chessman or after him?

A I think it was during that time.

Q And with reference to the discussion, you formed no opinion, I presume, that would cause you to be an advocate as to either position; is that correct?

A That is correct.

Q You understand that it is not our prerogative to argue the propriety of the death penalty. It is in the law and it is here today and we must live within this framework; you understand that, do you not?

A Yes.

Q But that it would be improper on your part to advocate certain enforcements or non-enforcements of the penalty based upon sympathies or prejudices that you may have if you are called upon to sit as a juror and we [fol. 267] get to that stage; right?

A Yes, sir.

Q Now, are you a member—I'm sorry, are any of your friends or members of your family members of any police or prosecution agency?

A No.

Q Have you sat on any prior cases involving criminal charges?

A No.

Q Now, again, going into the factors that I have covered before, the fact that we have asked certain people to step down and you may have walked over with them and discussed the weather with them, or whatever else came to mind, you understand that this can in no way affect your verdict?

You understand that what we do as attorneys, that we are trying to do our job as we see fit, and we cannot do something that you feel, "I don't like the attorney, therefore, I am going to take it out on the client." You understand that?

A Yes.

Q You understand that at times we will ask certain questions where objections will be made, and that in doing this we are not trying to keep anything from you but we are trying to carry the rules out as it should be; you understand that?

[fol. 268] A Yes, sir.

Q And you are not going to speculate or guess why we did it or what the outcome of the question or answer would have been if it is not allowed to come out; you understand that, do you not?

A Yes, sir.

Q That at certain times we may be questioning witnesses and we may be questioning them in a manner where it appears to be unkind, or that we are pushing, or we are trying to do something that you feel is unfair or unkind, again, you must understand that we have a right to carry the case out as we see fit; you understand this; do you not?

A Yes, sir.

Q And that if we get out of line, the judge is the arbitrator as to how the rules are carried out and he will stop it; you understand that?

A Yes.

Q And the fact that we may do this at times you cannot hold our conduct against the outcome with reference to our clients?

A Yes.

Q Is there anything about the fact that we have discussed the bifurcated or the double nature of the pro-

ceedings over and over again that would cause you to feel that we are conceding anything, or we are admitting [fol. 269] anything, or anything of that nature?

A No.

Q You understand that we shall not have another opportunity to discuss your qualifications, so that we have to do it now even though we are making certain assumptions that something may or may not happen in the future?

A Yes.

Q Is there anything about any of the questions that have been asked by myself or the other attorneys that you would want to discuss at this time?

A No.

Q Do you feel that, as you sit here now, that you could properly sit in this case and carry out your duties as a juror fairly and honestly?

A Yes.

Q Do you understand that although a person may be of a different race than you or myself, he is entitled to the same protection of the law as all of us?

A Yes.

Q You don't have any qualms about enforcing the law properly, fairly, and honestly, no matter what the person is as far as his background?

A That's right.

MR. BORNSTEIN: Thank you.

[fol. 270] Pass for cause, your Honor.

THE COURT: Thank you, Mr. Bornstein.

Miss Obera?

VOIR DIRE EXAMINATION

BY MISS OBERA:

Q Mr. Wain, did you answer all of the questions to yourself as I was questioning the other prospective jurors?

A Yes.

Q And did you think of any question which you would have answered differently?

A No.
Q I notice you have a book there. Are you going to school part time or anything like that?
A No, it is a book on the stock market.
Q Do you expect any problems in the market that may divert your attention from the case in the next few days?
A No, I am just studying the market.
Q Have you ever made any study of the law?
A No.
Q Never gone to law school or anything like that?
A I took a couple of courses in college.
Q What courses did you take?
[fol. 271] A Business law. Constitution law.
Q You took constitutional law in college?
A Yes.
Q In connection with a business course?
A Right.
Q Or as an elective?
A Elective.
Q Do you think that that might in any way effect your ability to sit as a juror?
A No.
Q You don't consider yourself a constitutional law expert at this point?
A No, ma'am.
Q If you think of any questions which you know should be brought to our attention would you let us know?
A Yes, sir.
Q You will have no hesitancy in doing that?
A That is correct.
Q And if you were a defendant in this case and all you wanted was a fair trial, would you be satisfied with a juror in your frame of mind sitting on the jury?
A Yes, I would.
Q And if you were charged with the prosecution of this case, and what you wanted was a fair trial, would you be satisfied with a juror in your frame of mind sitting on this case?

[fol. 272] A Yes, I would.
Q You say that without reservation?
A That is correct.
MISS OBERA: Thank you.
Pass for cause.

* * * *

[fol. 272] THE CLERK: Mrs. Janice C. Welker, W-e-l-k-e-r.

PROSPECTIVE JUROR WELKER
VOIR DIRE EXAMINATION

BY THE COURT:

Q Mrs. Welker, have you been able to hear as you sat in the back of the courtroom yesterday and today?
A Yes, sir.
Q And, that is Mrs. Welker; is that correct?
A Yes.
Q Calling your attention, then, first, to the nature of [fol. 273] this litigation, that is, an Information filed consisting of three counts, two of robbery and one of murder, is there anything in the nature of the litigation that causes you to feel you could not sit on this type of a case?
A No, sir.
Q Have you had occasion to sit as a juror before?
A No.
Q This is your first case?
A Yes.
Q Either civil or criminal; is that correct?
A This is my first case of any kind.
Q Of any kind?
A Yes.
Q You do not know anything about this case other than what you heard here in court; I take it?
A No, nothing.
Q You further understand by your last answer that you do not know any of the participants to the action, either the defendants, counsel, or any of the witnesses mentioned yesterday; is that right?

A No, no one.

Q As you heard the questions that were directed to the other prospective jurors by Court and counsel, did they suggest to you any reason why you could not sit on [fol. 274] this case?

A No.

Q Did they suggest to you any personal information that you would like to impart for the consideration of counsel at this time?

A No.

Q For example, you have never been a victim of a robbery, was one question that was asked? You have not?

A No, I never have.

Q You do not have any relatives or close members of your family in law enforcement agencies; is that correct?

A Yes.

Q Is there a Mr. Welker?

A Yes, sir.

Q What is his business or occupation?

A He is a salesman for Dowl Chemical Company.

Q I take it, then, Mrs. Welker, that you will agree in this case to follow the law as I shall state it to you at the conclusion of the case; is that right?

A Yes.

Q You further agree that if selected to serve as a juror in this case you will take the evidence from the witness stand and from that source alone?

A Yes.

[fol. 275] Q You understood the explanation that I gave to the jury about the fact that the Information is merely an allegation, that the People have the burden of proving the case, they having filed it; you understand that?

A Yes.

Q You further understand the basic and fundamental principle of our system of law that the defendants, and each of them, are presumed to be innocent until the contrary is proven, and in case of reasonable doubt they are entitled to an acquittal; you appreciate that?

A Yes, sir.

Q You further heard and understood the concept that the mere fact that the defendants are here for trial is not evidence of their guilt and it is not to be considered as such by the jury; you appreciate that?

A Yes, I do.

Q I'm sure at this point you understand the nature of the bifurcated proceeding in the State of California where the charge is one of murder?

A Yes.

Q In other words, that the same twelve jurors, depending on what type of a verdict they render in the guilt or innocence phase, may or may not be called upon to decide the proper punishment in the event, for example, that the verdict is guilty of murder, and the jury finds it [fol. 276] to be murder of the first degree; you appreciate that?

A Yes.

Q And we are dealing at this time on the contingency that we might get to this second phase, and the same jurors who decide the guilt or innocence of the defendant would then in that instance be called upon to decide the proper punishment; do you understand that?

A Yes.

Q You do not belong to any organization that advocates the retention or abolition of the death penalty?

A No, sir.

Q And you do not entertain any conscientious objection to the death penalty to the extent that they would preclude you from rendering that type of a verdict in a proper case if called upon to do so; is that right?

A That's right.

THE COURT: Thank you.

Mr. Lloyd, you may inquire for cause.

MR. LLOYD: Pass for cause.

Thank you, your Honor.

THE COURT: Thank you, Mr. Lloyd.

Mr. Bornstein?

[fol. 277]

VOIR DIRE EXAMINATION

BY MR. BORNSTEIN:

Q Mrs. Welker, the judge has asked many of the questions that we have been asking and I know it is probably getting to be quite boring, but I'm sure you understand the responsibility that all of us carry?

A Yes.

Q And you understand that even though we may appear to be repetitious, we may appear to be time consuming, that in no way can we cause this to change any opinions of having a fair trial?

A Yes.

Q With reference to prejudices and sympathies, you understand that you cannot allow these items or these ethical considerations to enter into your judgment here as far as this case is concerned; is that correct?

A Yes.

Q Did you agree with my little statement that a fair interpretation of what I said about the statue of justice being blindfolded because we are not going to look at the person, only look at the facts?

A Yes.

Q Now, is there anything that has been brought up here since we have been discussing the matter that you would want to raise at this time?

[fol. 278] A No, sir.

Q With reference to the double proceedings, or bifurcated proceedings that we are commenting on here, the fact that we have in the abstract discussed certain things that may or may not happen, you understand that this can have no meaning to you right now?

A Yes.

Q And you understand, also, do you not, that five days from now they can't have any meaning? You can't think, "Well, gee, the attorney talked about the death penalty, I wonder what his thoughts were?" You know this has no meaning to you; you understand that?

A Yes.

Q What my thoughts are and what the judge's thoughts are, the other attorneys' thoughts are as to why we go into these things.

Now, they are in the abstract merely because we are trying to arrive at a certain set of circumstances as far as what we feel would be right for our clients and this jury; you understand that?

A Yes.

Q The fact of the death penalty, have you had any particular thoughts or discussions about it either by yourself, reading something in a magazine or paper, or with friends or family?

A Well, thoughts. Certainly not any great discus- [fol. 279] sions. I am certainly not definite one way or another. I think there are proper cases where I could vote for the verdict.

Q Now, you realize here that we are not talking—we are talking now, in a sense, in an abstract situation, but that if you are chosen as a juror that you must decide the fate of two human beings; you understand that?

A Yes, I do.

Q And you understand the dreadful seriousness of the problem that is before you today?

A Yes.

Q If you are chosen as a juror?

A Yes.

Q Is there anything about any of the proceedings or anything that has gone on that would cause you to feel that you could not be a fair and impartial juror in this case?

A No, sir.

MR. BORNSTEIN: Thank you, very much.

Pass for cause, your Honor.

THE COURT: Thank you, Mr. Bornstein.

Miss Obera?

[fol. 280]

VOIR DIRE EXAMINATION

BY MISS OBERA:

Q Mrs. Welker, have you ever been employed outside your home?

A Not since I have been married, no.

Q And before your marriage, what was the nature of your employment?

A I worked for the Port of Immigration on Terminal Island, Immigration Department.

MISS OBERA: Pass for cause.

* * * *

[fol. 426] THE CLERK: Mrs. Carol Fogel, F-o-g-e-l.

PROSPECTIVE JUROR FOGEL
VOIR DIRE EXAMINATION

BY THE COURT:

Q Is that Miss or Mrs. Fogel?

A Mrs. Fogel.

Q Mrs. Fogel, do you know of any reason why you could not sit on this case?

A No, I do not.

Q Have you had occasion to serve as a juror before?

A No, sir.

Q This is your first case either criminal or civil; is that correct?

A Yes.

Q Do you know anything about this litigation other than what you heard here in court during the past three days?

A No, I do not.

Q Do you know any of the participants to the litigation?

A No, I do not.

Q Were you able to hear just about all the questions [fol. 427] that were asked of the other prospective jurors by the Court and counsel.

A Yes, I was.

Q Did they suggest to you any reason why you could not sit on this case?

A No, they did not.

Q Did they suggest to you any personal information that you wished to tell us about at this point?

A No, nothing.

Q I take it, then, you do not suffer from claustrophobia?

A No.

Q You have never been the victim of an armed robbery?

A No.

Q You have never studied law; is that correct?

A That is correct.

Q Is there a Mr. Fogel?

A Yes, there is.

Q What is his business or occupation?

A He is a school teacher.

Q In what level is he employed?

A He teaches sixth grade for the Los Angeles City Schools.

Q Are you employed outside of home?

[fol. 428] A Yes, I am.

Q And in what capacity.

A I am a secretary.

Q In what type of a concern?

A In a bank.

Q In a bank?

A Yes.

Q Do you have any close relatives or friends who are members of law enforcement agencies?

A No, sir.

Q I take it, then, you are not a member of any organization that seeks to abolish or seeks to retain the death penalty in the State of California; is that correct?

A That is correct.

Q You understand, I trust, at this time the nature of the bifurcated proceeding that the twelve people here finally selected to serve on this case may get into; do you understand that?

A Yes, I do.

Q I take it that you do not entertain any conscientious objection pertaining to the death penalty that would preclude you from rendering a decision such as that in a proper case; is that right?

A That is correct.

Q You agree in this case that you will take the evi-
[fol. 429] dence from the witness stand and from that source alone and you will follow the law as I shall state it to you at the conclusion of the case; is that correct?

A Yes, sir.

THE COURT: Thank you.

Mr. Lloyd?

MR. LLOYD: I will pass for cause. Thank you, your Honor.

THE COURT: Mr. Bornstein?

VOIR DIRE EXAMINATION

BY MR. BORNSTEIN:

Q Mrs. Fogel, I'm sure that you are getting about as tired as I am of hearing the same things over and over again, but I am sure you recognize the fact that we are not doing this to waste our time or your time?

A I understand.

Q Are there any questions that were asked of any of the other jurors that you would want to raise and amplify in answer to the question or questions?

A No, I have considered them all and I can think of nothing.

Q You considered the fact that you may be called upon to determine whether or not two human beings live
[fol. 430] or die?

A Yes, I considered this very seriously.

Q And have you considered the fact that you cannot be an advocate as to whether they shall or shall not live or die based upon any personal feelings or any outside factors, but merely upon the evidence and instructions that the Court will give you at the termination of the proceedings?

A Yes, sir.

Q And, assuming that there is a verdict as to the first phase and you go into the second phase and you feel, based upon the evidence that the punishment shall be one of two factors involved, would you have the courage of your convictions, after you discussed the matter fully with the other jurors and you felt that you were right, would you stick to your convictions?

A Yes, I would.

Q The fact that there may be other persons that would jump up and down and holler a little bit and say, "Let's get it over with," would this cause you to change your opinion in any way?

A No.

Q You understand that my defendant, Mr. Wilkinson, and Mr. Lloyd's defendant, Mr. McGautha, that they are entitled to your individual opinion as a juror?

A Yes, sir.

[fol. 431] Q The fact that the persons involved are of a different racial origin, would this make any difference to you?

A No.

Q The fact that there has been a considerable amount of problems recently because of the racial factor in the United States, would this cause you to feel biased or prejudiced in any way that would apply against my defendant or Mr. McGautha?

A No, sir.

Q You understand, I'm sure, if you analyze your own feelings, that in some way all of us have little petty biases and prejudices that we have built up over the years. These can have no bearing in this case; you understand that, do you not?

A Yes, I do.

Q A little example I give, and I am sure you look at it the way I do, that at one time a country is a friend of ours, and when something nice happens to them we are very pleased, and now that they are not friends of ours and something bad happens to them we are pleased, you see. So, in a sense, there is a bias, or a prejudice that is built up through the papers, through the news,

through television, that we have for our country, and we also have the same feelings about people we know at times; you understand this?

[fol. 432] A Yes.

Q I am not trying to say to you that you are a person that is not a fair person. When I say that, I think all of us have little biases and prejudices but I think when we look at our everyday life sometimes we see a person, we don't like them, we don't like his looks, maybe, and this is the type of thing I had in mind; you understand that?

A Yes.

Q And the fact that I may say something that would be of an insulting nature, or I may browbeat, you may think I am browbeating somebody, or I may be pushing a point as far as witnesses are concerned, you understand that I am not trying to hurt anybody and that what I am doing is trying to get the factual situation so you may have all the evidence before you; you understand that?

A Yes, I do.

Q The fact that a witness at times may reach the stage where they would cry, or they might do something in that nature, that, again, is not a matter of personality; you understand that?

A Yes.

Q And that because something like this may or may not happen, this could have no bearing on your being fair and impartial; you understand that, do you not?

[fol. 433] A Yes, I do.

Q With reference to the last point of being fair and impartial, as you sit here and you have examined your thoughts, I notice that I have watched most of you out in the audience over the last two days and you have been paying very close attention, is there anything that has come to your mind that would cause you to feel you could not be fair and impartial if selected to sit as a juror in this case?

A No, nothing at all.

MR. BORNSTEIN: Thank you very much.

Pass for cause, your Honor.

THE COURT: Miss Obera?
MISS OBERA: Pass for cause.

* * * *

[fol. 434] THE CLERK: Mrs. Harriet Grant, G-r-a-n-t.

PROSPECTIVE JUROR GRANT
VOIR DIRE EXAMINATION

BY THE COURT:

Q Mrs. Grant, having heard, now, the nature of this litigation, I'm sure, explained to you on many occasions as you sat in the back of the courtroom, do you know of any reason at this point why you could not serve on a jury of this kind?

[fol. 435] A No, I do not.

Q Have you, Mrs. Grant, have you had prior service as a juror?

A No.

Q This is your first case either civil or criminal?

A That's right.

Q Do you know anything about this litigation other than what you have heard here in court?

A No.

Q Do you know any of the participants to the litigation?

A No, I don't.

Q You understood my explanation of the bifurcated procedure when the charge is as it is in this case, murder in Count III of the Information; do you not?

A Yes.

Q You understand the contingency that we are dealing with and questioning jurors about at this time with the thought in mind that we might well get to that point; do you not?

A Yes.

Q And, I take it, then, in your answer to my first question, that you do not belong to any organization that

seeks the abolition or retention of the death penalty in [fol. 436] this state?

A No, I do not.

Q I take it that you would agree, if selected to serve on this case, to follow the law as I shall state it to you at the conclusion of the case; is that right?

A Yes.

Q I take it, further, Mrs. Grant, that you would agree that you would take the evidence from the witness stand and as it is received here in court during the course of the trial and from that source alone; is that correct?

A Yes.

Q Is there a Mr. Grant?

A Yes, there is.

Q What is his business or occupation?

A He is a publisher's representative having to do with magazines.

Q Publisher's representative?

A Yes.

Q And are you employed outside of the home?

A Oh, an occasional job as a cateress.

Q Calling your attention, now, to the questions that have been asked and directed to the other prospective jurors of a personal nature, did they suggest to you any information that you wish to volunteer at this time?

[fol. 437] A No.

Q For example, you have never studied law or been the victim of a robbery; is that correct?

A No.

Q You do not suffer from claustrophobia or have any close friends or relatives, that are members of a law enforcement agency; is that correct?

A No.

Q I take it, then, Mrs. Grant, that you are satisfied that if you are selected as a juror in this case that the defendants and the People would get a completely fair and impartial trial at your hands; is that correct?

A Yes.

Q I take it, then, Mrs. Grant, you do not entertain any conscientious objection to the imposition of the death

penalty to the extent that it would preclude you from ever voting for that type of punishment in a proper case if you felt that that was the proper punishment; is that right?

A That's right.

THE COURT: Thank you.

Mr. Lloyd?

MR. LLOYD: Your Honor, I have no questions of Mrs. Grant.

THE COURT: Mr. Bornstein?

[fol. 438]

VOIR DIRE EXAMINATION

BY MR. BORNSTEIN:

Q Mrs. Grant, if I asked you just the one question, that being, is there anything that you would want to discuss further based upon the questions that have been asked of the other jurors, would your answers be substantially the same?

A They would have been the same.

Q And the fact that I am not going into any greater detail as far as questioning, there is no reason that you feel you could not be fair and impartial; is that correct?

A No.

Q And the fact that I am not going to ask you any additional questions means nothing to you other than the fact that you will listen carefully, and there is nothing that can be discussed that has not been discussed earlier; is that correct?

A That's right.

MR. BORNSTEIN: Pass for cause, your Honor.

THE COURT: Thank you, Mr. Bornstein.

Miss Obera?

MISS OBERA: Pass for cause, your Honor.

* * * *

[fol. 442] THE CLERK: Mr. Allen Hamblin, H-a-m-b-l-i-n.

PROSPECTIVE JUROR HAMBLIN
VOIR DIRE EXAMINATION

BY THE COURT:

Q Mr. Hamblin, what is your business or occupation, sir?

A I am a teacher.

Q At what level, sir?

A Junior high school.

Q And with what school district are you associated?

A El Segundo.

[fol. 443] Q Is there anything, sir, in the nature of the litigation that we are about to select a jury to try that would cause you to feel that you could not sit on a case of this nature?

A No, sir.

Q Is there some particular subject that you teach at that level?

A I teach history of the United States and history of the world.

Q The explanation that I have given to the jury on many occasions, I trust that you heard and you understand that; is that correct?

A Yes, sir.

Q And you agree with the concepts, as I have enunciated them, that we try a case of this nature under; do you not?

A Yes.

Q You further agree that you will follow the law as I shall state it to you at the conclusion of the case?

A Yes, sir.

Q You further agree that you will take the evidence from the one source that you are obligated to take it from, and that is during the course of the trial and as it is received either from the witness stand or by way of physical objects, in the event that they are received into evi-

[fol. 444] dence; do you not?

A Yes, sir.

Q I take it, then, Mr. Hamblin, that you are satisfied in your mind that the defendants and the People

could get a completely fair and impartial trial in a case such as this from your hands; is that correct?

A Yes.

Q Have you had occasion to serve before as a juror?

A No, sir.

Q This is your first case; is that right?

A Yes.

Q The personal questions that were directed to the other jurors, as you heard those and applied them to yourself, did they suggest any information that you wanted to volunteer at this time?

A No.

THE COURT: All right, thank you, Mr. Hamblin.

Mr. Lloyd?

MR. LLOYD: I have no questions, your Honor.

THE COURT: Mr. Bornstein?

VOIR DIRE EXAMINATION

BY MR. BORNSTEIN:

Q Mr. Hamblin, the questions that were asked of [fol. 445] the jurors by all of us, are any of the questions subject to amplification by you or do you want to go into any greater detail?

A No, sir.

Q The fact that you have been sitting here for several days and listening to us over and over again, you understand that we are not trying to waste your time and we are not trying to waste ours; you understand that?

A Yes.

Q The fact that sometimes we seem to say we will accept the juror, or the prosecution has, and then someone else comes in, one of the defendants, and we ask another juror to be excused, again, you understand that this is not a matter of personalities or personal offense against anybody. We are trying to do what we have to, as we think it should be done properly; you understand that?

A Yes.

Q The fact that we have discussed the death penalty issue, again, this means nothing to you right now. You

will listen to the evidence, you will listen to the instructions and you will arrive at a verdict based on that and nothing else; is that correct?

A Yes.

Q Any reason that you feel, sir, that you cannot sit [fol. 446] fairly and impartially as a juror in this matter?

A No.

MR. BORNSTEIN: Thank you, sir.

Pass for cause, your Honor.

THE COURT: Thank you, Mr. Bornstein.

Miss Obera?

VOIR DIRE EXAMINATION

BY MISS OBERA:

Q Mr. Hamblin, as a teacher, I suppose you have engaged in discussions about the death penalty; haven't you?

A No.

Q You never have?

A No.

Q Not necessarily with your students, but with other members of the faculty?

A Not with the faculty.

Q Well, now, as we have gone along here for a couple of days asking questions, have you given serious thought to the matter of capital punishment?

A Yes.

Q And do you really think that you should be a juror in this case?

A I think I could give a fair judgment, yes.

[fol. 447] Q You are aware of the responsibility which you are undertaking?

A Yes, ma'am.

Q And you are willing to undertake that responsibility?

A Yes, ma'am.

MISS OBERA: Pass for cause.

* * * *

[fol. 453] THE CLERK: Mrs. Rita Braun, B-r-u-a-n.

PROSPECTIVE JUROR BRAUN
VOIR DIRE EXAMINATION

BY THE COURT:

Q Mrs. Braun, do you know of any reason why you could not sit on this case?

A No, I don't.

Q Have you had occasion, Mrs. Braun, to sit as a juror before this case?

A About fourteen years ago, civil case.

Q And that was on a panel in the Superior Court?

A Municipal Court.

Q And this is your first case, then, on this second tour of duty; is that correct?

A Yes, it is.

Q Is there anything that you know about this case other than what you heard here in court today?

A No, there isn't.

Q Do you know any of the participants to the litigation?

A No, I don't.

[fol. 454] Q You heard my explanation of the fundamental concepts that we try a case of this nature under; did you not?

A Yes.

Q And you understood them as I explained them to the other members of the jury?

A Yes.

Q You agree in this case that you will follow the law as I shall state it to you; is that correct?

A Yes.

Q You further agree that you will take the evidence only from one source and that is as it is received here in the course of the trial; is that right?

A That's right.

Q You do not belong to any organization that advocates the retention or abolition of the death penalty in this state?

A No, I don't.

Q I take it that you do not have any conscientious objections about the death penalty that would preclude you from serving on a case of this nature; is that right?

A That's right.

Q In the personal questions that were asked the other members of the jury, did they suggest any reason, or, any information that you would like to tell us about at this point?

[fol. 455] A No.

Q You are satisfied in your mind that if you are selected as a juror in this case that both of the defendants and the People would receive a completely fair and impartial trial; is that correct?

A Yes.

Q And that would be based on the evidence and the law alone?

A Yes.

Q What is the business or occupation of your husband?

A He assembles computers.

Q By what corporation is he employed?

A California Computer Products in Anaheim.

Q Are you employed outside of the home?

A No, I am not.

Q Have you ever been employed outside of the home?

A Twenty-one years ago.

Q In what capacity?

A General office work.

Q I take it, then, there is nothing in the projected length of this trial that would cause any undue hardship upon you if you are selected; is that right?

A That's right.

[fol. 456] THE COURT: All right, thank you.

Mr. Lloyd?

MR. LLOYD: I will pass for cause, your Honor.

THE COURT: Thank you.

Mr. Bornstein?

MR. BORNSTEIN: I will pass for cause, your Honor.

THE COURT: Thank you.

Miss Obera?

MISS OBERA: Pass for cause, your Honor.

* * * *

THE CLERK: Mrs. Mildred Barden, B-a-r-d-e-n.

PROSPECTIVE JUROR BARDEN
VOIR DIRE EXAMINATION

BY THE COURT:

Q Mrs. Barden, do you know of any reason why you could not serve on this case?

A No.

Q I take it, then, in response to that question, that you have had an occasion to hear all of the proceedings [fol. 457] that have gone on thus far during these past three days; is that correct?

A Yes.

Q And you do not know anything about this litigation other than what you heard here; is that right?

A That's right.

Q And, I take it, then, that you do not know any of the participants to the litigation; is that also correct?

A Yes.

Q Have you had occasion, Mrs. Barden, to serve as a juror before?

A No, I haven't.

Q This is your first case on any panel of jury duty; is that correct?

A Yes.

Q Is there a Mr. Barden?

A Yes.

Q What is his business or occupation?

A He is a physician.

Q He is a physician?

A Yes.

Q Is there some specialty that he practices medicine in the field of?

A No.

Q General practitioner?

[fol. 458] A Yes.

Q Are you employed outside of the home?

A Yes.

Q In what capacity?

A Part time medical receptionist.

Q Can you raise your voice just a little bit.

A Part time medical receptionist and music teacher, part time.

Q Is there anything in the nature of the other questions that were directed to the other prospective jurors by way of a personal nature that, as you heard them, you thought, "Well, I should make some statement when, if and when I get in the jury box."

A No.

Q You are satisfied, then, Mrs. Barden, that you could give to both of the defendants and to the People a completely fair and impartial trial in this case?

A Yes.

Q And, once again, at the ris kof being terribly repetitious, but I do want you to understand that the defendants, although they are joined and tried together as co-defendants, are each entitled to the individual judgment of the jury on the question of their innocence or guilt; you understand that, of course?

A Yes.

[fol. 459] Q And I trust at this point that there are no questions that you have about the bifurcated procedure and how we proceed in a case such as this where the charge is one of murder?

A No.

Q That is, that we first take evidence on the question of guilt or innocence of the defendants and the jury is given instructions on the law.

The jury then goes out to deliberate on the question of guilt or innocence of the defendants.

The jury will be given separate verdicts as to each count in the Information and as to each defendant.

The jury is then called upon to decide, if they can, the question of the guilt or innocence of the defendants, exclusive of any question of penalty or punishment, based solely upon the evidence and based solely upon the law, and then, depending upon what the verdict or verdicts are that the jury returns on the initial stage, we then either do or do not, with the same twelve jurors, start a separate and distinct hearing and trial on the question

of penalty or punishment, if the verdict is one of murder and if the verdict is one of murder in the first degree.

I'm sure after all the times that that has been said by me that you do understand that concept; do you [fol. 460] not?

A Yes.

Q And, once again, although at this point it is hard to believe that anybody could not comprehend that concept, we are merely talking to jurors at this time about their feelings on the death penalty because we may get to that, and I don't want you or any other juror to take all of this conversation and all of the questioning that we have had pertaining to the issue as any evidence that we are going to get to that point; you appreciate that?

A Yes.

Q And you do not entertain any conscientious feelings pertaining to the death penalty that would preclude you from rendering, in a proper case, that type of decision if called upon to do so; is that right?

A No.

Q I take it the converse is true, that you do not favor the death penalty over life imprisonment; is that correct?

A That's right.

Q In other words, you are willing, in the event that you are called upon to decide that issue, to listen to all of the evidence that will be presented on that issue and make a determination based upon that and the law as the Court will give it to you; is that right?

[fol. 461] A Yes.

THE COURT: Thank, you, Mrs. Barden.

Mr. Lloyd?

MR. LLOYD: No questions. Thank you, your Honor.

THE COURT: Mr. Bornstein?

MR. BORNSTEIN: Pass for cause. Thank you.

THE COURT: Miss Obera?

MISS OBERA: Pass for cause, your Honor.

* * * *

THE CLERK: Mr. Roderick Haskell. First name spelled R-o-d-e-r-i-c-k. Last name, H-a-s-k-e-l-l.

[fol. 462]

PROSPECTIVE JUROR HASKELL
VOIR DIRE EXAMINATION

BY THE COURT:

Q Mr. Haskell, do you know of any reason, sir, as you now sit in the jury box why you could not serve on a case of this nature?

A No, I don't.

Q What is your business or occupation, Mr. Haskell?

A Test man, Pacific Telephone.

Q Is this your first case as a juror?

A Yes, sir.

Q Either civil or criminal; is that correct?

A Correct.

Q And this is your first tour of duty on any jury panel; is that correct?

A Yes, it is.

Q Is there a Mrs. Haskell?

A Yes.

Q Is she employed outside of the home?

A No, she is a housewife.

Q Do you know anything about this litigation other than what you heard here in court?

A No, sir.

Q Do you know any of the participants to the litiga-

[fol. 463] tion?

A No, sir.

Q As you heard these various questions that were directed to the other prospective jurors by the Court and counsel, they suggested to you no reason why you could not sit on this case and render a completely fair and impartial verdict based upon the evidence and the law; is that correct?

A Yes.

Q Did they suggest to you any personal information that you felt at the time you heard the questions that you would like to volunteer if and when you got into the jury box?

A No.

Q I take it, then, Mr. Haskell, that you do not belong to any organization that advocates the retention or the abolition of the death penalty in this state; is that correct?

A That is correct.

Q You are satisfied, Mr. Haskell, that if you are selected as a juror in this case that the defendants, and each of them, and the People would receive a completely fair and impartial trial; is that correct?

A Definitely.

THE COURT: All right, thank you, Mr. Haskell.

Mr. Lloyd?

[fol. 464] MR. LLOYD: No questions of Mr. Haskell, your Honor.

THE COURT: Mr. Bornstein?

MR. BORNSTEIN: Pass for cause, your Honor.

THE COURT: Miss Obera?

MISS OBERA: Pass for cause, your Honor.

* * * *

PROCEEDINGS AND TESTIMONY AT PENALTY PHASE

[fol. 427]

LOS ANGELES, CALIFORNIA, WEDNESDAY, AUGUST 23, 1967, 10:00 A.M.

—oOo—

THE COURT: All right. In the case of People versus McGautha and Wilkinson, I will have the record reflect the appearance of both defendants, the presence of all counsel, and the jury in their respective places in the jury box.

Good morning, ladies and gentlemen.

This matter is scheduled of this date for further proceedings in the matter, the jury having returned a verdict of guilty as to each defendant of murder in the first degree. The matter is now calendared at this time for the penalty phase of the trial. Are the People ready in this matter?

MISS OBERA: People are ready, your Honor.

THE COURT: Is defendant McGautha ready?
MR. LLOYD: Yes, he is, thank you, your Honor.
THE COURT: Is defendant Wilkinson ready?
MR. BORNSTEIN: Yes.
THE COURT: Do you desire to make an opening statement in this matter, or do you have any evidence?
MISS OBERA: I waive opening statement, your Honor.
THE COURT: Do you desire to make an opening statement at this time?
MR. LLOYD: No, your Honor.
THE COURT: Do you desire to make an opening [fol. 428] statement at this time?
MR. BORNSTEIN: Not at this time.
THE COURT: All right. You may proceed, Miss Obera.
MISS OBERA: Your Honor, I have here a file of documents from the State of Texas, County of Walker, pertaining to Dennis McGautha. These documents are all stapled together. I ask that collectively this file consisting of records of judgments, photographs, fingerprints, be marked People's Exhibit 27.
THE COURT: It will be so marked for Identification as People's Exhibit Number 27.
MISS OBERA: And received in evidence.
MR. LLOYD: May the record reflect that I have examined the documents.
No objection, your Honor.
THE COURT: It will be received in evidence bearing the marking given to them for identification as People's Exhibit 27.
MISS OBERA: The People rest.
THE COURT: Who was going to proceed first?
MR. LLOYD: May we have a short 15-second conference?
THE COURT: Take your time.

(Counsel confers.)

MR. BORNSTEIN: Your Honor, I'd like to make a short opening statement, if I may.
THE COURT: You may.

[fol. 429] MR. BORNSTEIN: Ladies and Gentlemen of the Jury, we have reached the stage of the proceedings that when you were questioned originally I'm sure that you know now why we went into such great detail.

I am going to put Mr. Wilkinson on the witness stand.

I am going to bring out his background. I am going to ask him about some of the things that happened, but I want you to understand very carefully that in doing this I am asking you to consider Mr. Wilkinson alone.

I am not asking you to take anything that he says and to apply it against Mr. McGautha.

In this proceeding each person is an individual human being. He is to be judged as an individual and what Mr. Wilkinson says, he is doing it because I am going to put him on the stand and I feel it is important for you to know something about his background when you go in that jury room and decide whether or not he should live or die, and in doing this I have to bring out certain things that may not be of help, and it could be, in a sense, a hindrance to Mr. McGautha, but I am not doing it to hurt Mr. McGautha. I am not doing it to throw the blame over on any other person.

I am merely doing it so that you will have a complete and, what I hope is, an over-all picture of what took place involving the robbery that caused the death of Mr. [fol. 430] Smetana.

In going over Mr. Wilkinson's life you will see that he is a person that came from a background, a mixed-marriage background.

He didn't do too well in school.

He was in the Army a short time. He was released because he didn't have the mental capacity to carry out the functions of a soldier.

That he has been in California for a short period of time.

That at one time he was involved with a church group.

Mr. Davis—Reverend Davis, I thought would be here this morning, but he should be here this afternoon, will testify that Mr. Wilkinson used to attend church quite regularly and then he left the group.

He fell in with a group of persons and because of this he no longer went to the church, and in falling in with this other group of persons he met Miss Dupree.

[fol. 431] In meeting Miss Dupree, he became involved with her, and Miss Dupree has two children, as she told you, and it turned out that Miss Dupree was living with her sister, and her sister used to have many men come over to visit her, and I'm sure that in living with her that it was rather a dissolute type of relationship that was going on with these other men and Miss Dupree's sister, and that in doing this, one of the children had been hurt by someone, probably in some sort of a drinking party, and Mr. Wilkinson was trying to take her out of this, and that he needed some money, and in needing money, he became involved with someone who said he could make money in an easy way, and the most difficult money that any person could ever earn in his life, because he is now facing you because of trying to make money the easy way and his life is in your hands as a consequence.

Thank you, Ladies and Gentlemen.

THE COURT: Thank you, Mr. Bornstein.

Do you desire to make an opening statement on behalf of defendant McGautha at this time?

MR. LLOYD: Not at this time. May I reserve the right, if your Honor please?

THE COURT: Call your first witness.

MR. BORNSTEIN: Thank you.

Mr. Wilkinson, will you take the stand.

THE CLERK: Would you raise your right hand, sir, [fol. 432] and be sworn by reading the oath aloud as you see it there before you.

THE WITNESS: I do solemnly swear the testimony I shall give in the case now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help me God.

THE CLERK: Be seated.

Would you state your full name, please.

THE WITNESS: William Rodney Wilkinson.

THE CLERK: Spell the last name, sir.

THE WITNESS: W-i-l-k-r-i-n-s-o-n. No. W-i-l-k-i-n-s-o-n.

THE CLERK: Thank you.

WILLIAM RODNEY WILKINSON,

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q Mr. Wilkinson, what is your date of birth?
A March 4, 1941.
Q How old are you today?
A Twenty-six.
Q Where were you born?
A Greenfield, Mississippi.
[fol. 433] Q How long did you live in Mississippi?
A Up until 1960.
Q All right. Did you attend school in Mississippi?
A Yes. I went to Sacred Heart High School in Greenfield.
Q How high did you go in school?
A Well, I went to the 11th Grade.
Q What race or racial origin is your mother?
A She is Negro.
Q What about your father?
A He is white.
Q Did you have any problems when you were a youngster because of this?
A Well, kids at school, they'd tease.
Q Who would tease you, what kind of children, white children, colored?
A No. Negro children. I went to a Negro school.
Q How did you do in your school studies?
A Well, I did fair; not too good.
Q What kind of classes did you take?
A Regular high school, history, and mathematics, and English.

Q Why was it you only went up to the 11th grade? [fol. 434] Was there any particular reason?

A Well, I quit—after dad had died, mother didn't have too much else. I went—I found me a job and I would help her out as much as I could.

Q When did your father die? How old were you?

A About 12 or 13.

Q When did you start working to help your mother out?

A Well, I started—well, I had a paper route when dad had died, and then I started helping around grocery stores, delivering packages and groceries in the neighborhood.

Q How many brothers and sisters did you have when your father died?

A Four sisters and one little brother.

Q Who was the oldest?

A Sue. That's—Sue Washington.

Q Where were you in relationship to being the oldest or the youngest?

A I had two sisters older than me, and the rest younger.

Q What kind of jobs did you work at when you were —after you left school and, oh, say, when you were 16, 17, 18 years old?

A Well, a man named Mr. Jack in the neighbodhood, he let me work at a service station, and I worked mostly [fol. 435] around the service station.

Q Did you have any formal training that caused you to have any specific skill such as being a mechanic or printer or anything like this other than just these jobs that you had?

A Well, no—a neighbor, they always working on cars, and the neighbor's son, we used to all get together and fix old cars and stuff.

Q All right. When you were 18 years old, did you go into the Army?

A Yes.

Q Were you drafted or did you enlist?

A I enlisted for the draft.

Q How long were you in the Army?

A About five or six months.

Q Do you know why you were released from the Army?

A Yes. They passed some kind of law where your I.Q. had to come up to a certain standard, and it was so many thousand men kicked out because their I.Q. wasn't up to the standard, but—

Q Do you know what your—

A —I went through basic and everything.

Q You were not put out of the Army because you caused any trouble or anything like that?

A No, just for low I.Q.

[fol. 436] Q Did you have any disciplinary action against you when you were in the service?

A No.

Q Then you were—What type of discharge did they give you?

A Honorable Discharge.

Q Do you know what your I.Q. level is?

A No, not right offhand.

Q Do you know what the level was that the Army wouldn't keep you at?

A No. It was a series of tests they gave us, and we had to make 90 on all the tests, and I think I was short a few points.

Q Somewhere in the eighties?

A That's right.

[fol. 437] Q And after you left the Army, where did you go?

A I went back to Jackson, Mississippi.

Q And what kind of work did you do then?

A Oh, I got my old job back at the station.

Q What about your sisters and brother, and your mother? What were you doing? Were you living at home when your aunt went back home?

A Yes.

Q Were you still helping to support the family?

A Yes.

Q You got in some sort of trouble when you were—after you got out of the Army, something about some checks; is that correct?

A Yes.
Q What happened with reference to this?
A Oh, a girl friend of mine, she worked at the store and she was cashing some checks on this lady that owned the store, and some kind of way she involved me.
I spent some of the money and the police arrested me, but they didn't get any conviction on me. They convicted her and I think I did a couple of months in jail.
Q While you were awaiting trial?
A Yes.
[fol. 438] Q But you were never convicted?
A No.
Q And then after this event you went to California; is that correct?
A Right.
Q What time did you arrive in California? What was the year?
A 1960, I believe it was.
Q And did you look for a job when you came to California?
A Yes.
Q Did you find work?
A Yes, J. W. Robinson.
Q And what were you doing with J. W. Robinson?
A Washing dishes.
Q And where were you living when you first came to California?
A I lived with Reverend Charles Davis. He has a rooming house on Pico and Los Angeles Street, and I rented a room from him.
Q And when you were renting the room, from Reverend Davis, what kind of a church, denomination was he connected with?
A First Baptist.
Q And did you have any relationship with him as far as his work as a preacher?
[fol. 439] A Well, I helped him—First he asked me did I belong to a church and I told him, yes, and he asked me would I—how about coming to church with him, you know, and so I started going to church and I liked it, you know, his church and I joined his church.

Q And how long did you continue doing this?

A Well, I have been—up until I got arrested, I have been going to his church.

Q And how long did you continue to stay with Reverend Davis?

A About two years.

Q All right, now when you were at Robinsons you started out as a dishwasher. Did you advance in any manner?

A Yes, in about two months I advanced to a baker.

The lady called me out and she talked to me and she asked me did I think I could bake. The guy quit, the regular baker she had, so I told her, yes.

So they gave me a couple of weeks and I started baking.

Q How much were you earning per hour when you were a baker?

A $1.85 an hour.

Q How many hours a week were you working, approximately?

[fol. 440] A During the holidays, we worked 12 hours a day, but usually eight hours a day.

Q Were you doing anything as far as helping your mother and your younger sisters in Mississippi during this time period?

A Yes, I would send them money when I had it. I could save my money and so I would send them money. She needed money for all the kids.

Q Did you leave J. W. Robinsons?

A Yes, I found a better job at Art Craft Picture Frames.

Q Did you make more money?

A Yes.

Q And how long did you work at Art Craft Picture Frames?

A About a year and a half.

Q Now, something happened to you on July 4, 1965? What was this?

A A gang of fellows shot me.

Q Was there any reason that you know of?

A No.

Q Did you know any of these persons?
A No, we—I was just walking down the street and they come out of an alley and shot me, you know, and ran.
The police never did find out who it was.
[fol. 441] Q Where were you shot?
A In the back.
Q And did you go to the hospital because of this?
A Yes.
Q How long were you in the hospital?
A About a week.
Q And after you got out of the hospital where did you go to live?
A On Jefferson, with Iola.
Q That is Iola Henry?
A Yes.
Q How long did you stay with Iola?
A I imagine a year or two.
Q And you found out that when you got out of the hospital she had made arrangements for you to have a place to stay, and so forth?
A Yes.
Q You were unable to work at this particular time; is that correct?
A Right.
Q Now, at some time you met Erma Dupree; is that correct?
A Right.
Q When did you meet her?
A Just before Christmas.
[fol. 442] Q Of what year?
A '66.
Q And what were the circumstances that you met her under?
A Well, I was going downtown in a truck and she was at a bus stop and I stopped for the red light and she said, "Hi, can I get a ride?" So I picked her up and took her to the hospital and she asked me would I wait on her. I said, "Yeah." We had dinner later.
Q Now, did you meet any other persons through Erma?

A Yes, I met her sister.
Q What is her sister's name?
A Lowanda.
Q Did you meet a girl by the name of Sharon Jones?
A Yes.
Q Did you meet a fellow—what is Sharon's husband's name?
A Guy Jones.
Q Did you meet anyone else through these persons?
A Yes, I met Dennis.
Q Dennis McGautha?
A Yes.
Q And were you working during this time period [fol. 443] that you were living with Erna?
A Yes, I was working at Great Western Bag Corporation.
Q Where was that at?
A Vernon.
Q What kind of work were you doing?
A I was baling bags. The bales came out of the chute and I taped the ends up and stacked them.
Q How much were you earning an hour?
A $2.65 an hour.
Q Now, was there some conversation that you had with Mr. Jones about robberies?
A Yes.
Q Who initiated this conversation?
A He did.
Q What did he tell you?
A My rent was due and his rent was due, and the landlady had been over, you know, she was going to put both of us out, and he said, "Man, we ought to go knock over somebody and get some money of some kind over here." So we were all drinking and talking.
Q Up to this time, in your life have you ever had any thoughts of holding anybody up or stealing money by use of force or violence?
A No.
Q All right, and then what happened after this as [fol. 444] far as Mr. Jones, and what took place?
A Well, I was living with Erma, Erma and her sister, and Erma's sister was having—she had two or three

boy friends over. One of them fell on one of Erma's babies and hurt the baby.

Q How old was this baby that was hurt in the process?

A About three or four months old. Just a small one.

Q Was this person, the fellow that fell on the baby drinking or anything like that before this happened?

A Yes.

Q And how bad was the baby hurt?

A She took—we took the baby to the hospital and they told Erma she was not treating the baby right. They kept the baby.

[fol. 445] Q They kept the baby in the hospital?

A Yes.

Q How long?

A Two weeks.

Q So after this, did you decide that you wanted to move out of there?

A Yeah.

Q Were you working at this time?

A Yes.

Q Then what happened?

A Well, I called Dennis up and told him what happened, and he said, "Well, Man, you come stay with me until you can get your apartment."

I said, well—I asked Erma about it and she said—she agreed to it, you know.

Q Then you and Erma moved in with Dennis, and was there someone else there?

A Yes.

Q Who was that?

A Fannie; Fannie Lue Smith.

Q Fannie Lue Smith?

A Uh-huh.

Q How long did you stay with Dennis before the date of February—when did you move in in relationship to the date of the 14th of February, 1967?

A I think about a week before then, before Febru-

[fol. 446] ary.

Q What happened with reference to staying with Dennis and Fannie? Were you still working at this time?

A No.

Q What happened as far as your job—

A Well, I didn't have transportation out there. I was going to try to take another job, and meanwhile this job didn't come in, and the man out at the Great Western Bag, he dismissed me because he said, "You don't have a car", and the shift I was working, I was working graveyard shift.

Q How did you have to get to work when you were working graveyard shift?

A On the bus.

Q How long did it take you to get to and from work?

A Oh, about an hour, because the bus goes so far, to Vernon, and I think it was Alameda, and then it turns around and goes back.

Q How far did you have to walk after you got off the bus to get to work?

A About a mile, across Downey Road, I think it was, Loma Vista.

Q About this time, were you getting desperate for some money?

[fol. 447] A Well, yes, I was.

Q What happened as far as money and the fact that you didn't have any and you needed some?

A Well, my mother send me some money. I called her and told her I needed some money and she send me some money. She sent it to Iola, and I got one money order from her, and she sent another one, but I never did get that one.

Q All right. What happened as far as trying to get money by use of force or violence? What took place?

A Well, it was mentioned—

Q Who mentioned it?

A Me and Dennis. We talked about it, or Guy talked about it.

Q What were your feelings at this time about engaging in holdups or robberies?

A I didn't like the idea.

Q Did you express yourself? Did you tell anybody you didn't like the idea?

A Yes. I told Erma about it.

Q All right. At some time, you had a gun or you got a hold of a gun; is that correct?

A Yes.

Q Where did you get this gun at?

A I was working up on Mount Olympus in Hollywood, up on Charles Benson, and he got a bunch of [fol. 448] trucks and stuff up there, and this construction work, and this old pistol was up there in the glove compartment of one of the trucks I drove, and I asked Charles could I have it, and he said, "Yeah, you can take it. It ain't good for nothing."

He asked me where did I find it. I told him I found it inside one of the trucks. He said, "Well, I guess one of the workers up there, they do a lot of shooting up here, target practicing, and stuff like that."

Q What kind of a gun was this?

A A .32 automatic.

Q What condition was it in?

A Well, it didn't have a clip, and one of the sides of the handle was broke off and wasn't in too good a condition.

Q Did you ever shoot the gun?

A No.

Q Did you ever know if it would in fact shoot?

A No, I didn't know.

Q All right. On the date in question that the Pon Lock store was held up and Mr. Smetana's store was held up, what happened? Let's start with that date, earlier on that date. What's the first thing you can recollect about that date?

A Well, we got—me and Dennis got up and we rode around. I think he went to pay a bill or something. We [fol. 449] passed through the neighborhood. This guy Jones, he lived over in that neighborhood, and we went by to see if he was home, and he was.

Q Is that Pon Lock's store's neighborhood?

A Yes.

Q On Wall Street?

A Right.

Q Thirty-seventh and Wall Street, in that area?

A Yes.

Q All right. Did you have a conversation with Mr. Jones about that store?

A Yes. He was telling us about how easy the store would be to knock over, you know.

Q You meant by "knock over"—he meant holdup; is that right?

A Yes.

Q Then what happened?

A I told him, I said, "I don't know." I said, "Don't people live in the back of the store, you know." I said, "That wouldn't be a good idea, to hit that little store. You probably couldn't get nothing out of it, anyways", and that was all.

[fol. 450] Q All right. Now, did you later come back to the subject matter of this store?

A Yes.

Q Where was this?

A We were passing by the store.

Q Who was passing by?

A Dennis and I.

Q What was said?

A Dennis told me, "Let's go in and look it over."

Q All right. What happened?

A So we parked and went in, and I bought a can of beer, and he bought a can of beer, and we walked out.

Q Then what happened?

A We left, and I think we went back to the house, and the next day we went down to the store again.

Q Who went by the store again?

A Dennis and I.

Q All right. What happened on this date?

A We got out and went in the store, and he asked the lady about some bow dollar—

Q I am sorry. What was that word?

A Give a bow dollar, a silver dollar.

Q A silver dollar?

A Yes. He was teasing her about could he get more [fol. 451] than a dollar for the bow dollar.

Q For a bow dollar?

A For a silver dollar.

Q You call it a bow, b-o-w, dollar; is that it?

A Yes. And she was telling him, no he couldn't by a dollar for it, you know. It was just worth a dollar to her. And, meanwhile, there is a little rack with potato chips and stuff on it. I got some potato chips, I think, and Dennis orders some wine, and, I don't know, when I knew anything, Dennis was robbing.

Q You were by the other lady; is that right?

A I was in the back—yeah, I seen the little girl that got up on the stand. She was putting some groceries on the shelf.

Q Did you have a gun with you then?

A No, and she—I asked her was anybody in the back of the store, and she said, "Yes", so I was looking in the back of the store. Dennis said, "Come on, man. Let's go." So we left.

Q Is that the day that the young boy was in there?

A Yeah.

Q You bought him a peppermint stick for a penny?

A Yes.

Q Why did you do this?

[fol. 452] A Well, the kid, he was trying to stick his candy in the pickle, and the top of it was too rough, and this candy—he dropped his candy and it broke—the peppermint candy, when it breaks, it just splatters everywhere—so he looked so pitiful, you know, he didn't have another penny to buy him another one, so I bought him another peppermint stick and put it in for him.

Q Then you left the store, and where did you go then? Was Fannie Smith in the car at that time?

A No.

Q This is at the time when you held up the—Pon Lock was held up. Do you remember whether she was in the car or not?

A Oh, yes, she was in the car. That's right. She was driving. This was the next day.

Q Then what happened after you left Pon Lock's?

A We got in the car and we left, and went back to Dennis' house.

Q What happened there?

A Well, Sharon and Erma was coming up the back steps, and so we all went in and sat down, and I was talking to Erma. I asked her where she had been. She was telling me where she had been, and I spoke to Sharon, and that was all.

Q All right. Then what happened?

[fol. 453] A Sharon told us she had to get home before Guy got home from work because she had been out and she didn't want him to know she had been out.

Q All right. Then what did you do?

A She asked Dennis to take her home, and—no, she asked Fannie to take her home, so Fannie and Erma and Sharon was getting ready to go, so Dennis said, "Wait a minute. We'll all go", you know, so all of us got in the car and took her home.

Q All right. Mr. Wilkinson, what hand do you use to do any of the daily tasks such as writing or eating? What hand do you use naturally and normally?

A I'm left handed.

Q Do you do everythig left handed as far as anything that you would do with one hand?

A Yes.

Q And then all of you were in the car together. This would be you and Dennis and Fannie and Jones and the two children; is that correct?

A Yeah.

Q You went from Fannie or Dennis' place over to the Jones' residence; is that right?

A Right.

Q You left off Sharon Jones?

A Right.

Q Then what happened?

[fol. 454] A Well, we—Fannie said she didn't want to go home, she wanted to go riding, and we all feel like riding, so I said, "Well, why don't we get some beer and go riding", so we went out Venice. We were going to ride out by the beach, and as we were going out Venice, well, I don't know, Fannie was telling us about a place where she used to work in this vicinity, and there was a store there, so I said, "Well, let's stop at this store and get some beer", you know, so we—you couldn't park on

Venice. There is no parking there, so we pulled on Harvard and stopped, and we got out and I went in the store and got a six pack of beer, and I think Dennis got a six pack of beer, and we left.

Q Was the lady in the store when you bought the beer?

A No.

Q The man was?

A Yeah.

Q All right. Then what did you do after you bought the beer and went back to the car?

A We got in the car and we went on out Venice, riding and drinking beer and talking, and so we rode so far, so we changed our mind and turned around and come back toward home.

Q Why did you go back?

A Well, I don't know. We just changed our minds. [fol. 455] We didn't want to go to the beach.

Q Who was driving the car?

A Fannie.

[fol. 456] Q And you were going back to the same area. Did you stop by the same store again?

A Yes.

Q Was there some conversation in the car about hitting the store?

A No, never.

Q Was there something said after you came back from the store about going back there and what you were going to do there?

A No, never did come up about hitting the store at all.

The only thing we said about the store, Fannie said it was a nice little store. That it was—She has worked in the vicinity and when she was working there she went in there a couple of times.

Q Did she say anything about the fact that there was just a man and a wife in there?

A Yes.

Q And did she say anything about, "It would be easy to do something in there."

A Yes.

Q And by that she meant easy to rob; is that right?
A Yes.
Q And this was discussed in the car; right?
A Yes.
[fol. 457] Q Who entered into the discussion?
A It was her and Dennis talking.
Q And then what happened?
A We stopped. We pulled over around Harvard and stopped again and Fannie said she was going in and get some groceries to make some sandwiches for us when we get back home because everybody was hungry. She said she didn't feel like cooking a full meal.
Q All right, then she went to the store and then what did you do?
A Oh, Dennis and I were still in the car so, I don't know, Dennis told us, "Man, let's go in and look at the store."
I said, "Well, yeah, we can get some cold beer."
Q Did you have a gun with you at this time?
A No, my gun was in Erma's diaper bag.
Q Did you get your gun?
A No, it was still in there.
Q When you left the car did you get your gun?
A No.
Q Did Dennis have a gun?
A I think so, yes.
Q And then you and Dennis went into the store; right?
A Yes.
[fol. 458] Q What happened in the store?
A Well, I went back to the beer cooler and there was some old man back there already getting some beer.
Q Describe this old man, if you will, please.
A He was about, I'd say five ten or five eleven, and I'd say he weighed around 200 pounds.
Q Was he colored or white?
A No, he was a white man.
Q Anything else you remember about it?
A Yes, he was getting a six pack of Coors out of a box, the small cans.
I teased him. I said, "You get your money's worth if you get—if you get a big can."

He said, "No, I can't drink a whole beer because I leave half of it."

And I got a six pack of Colt .45 out and by that time this lady screamed and he turned around and I turned around and he says "What is going on over there?"

I said, "I don't know."

So he started over and I grabbed him. I told him not to go over there because he might get hurt, and so he said, "What is this, a robbery?"

I said, "Yeah."

He said, "You want my money?"

I said, "No, I don't want your money. Just stay right [fol. 459] here."

Q Then what happened?

A And then I heard a shot and Dennis told me, he said, "Come on, let's go, man."

So I ran out of the store.

Q Did Dennis have something with him when he left the store?

A Yes, he had a newspaper and a bottle of wine.

Q And you got back to the car?

A Yes.

Q And then you went back to Fannie's house; is that right?

A Yes.

Q And the testimony that Erma Dupree gave with reference to the gun and bullet, was that substantially correct?

A Well, yes, I got my pistol out of the diaper bag and after I realized what had happened I just unloaded it.

It has a—wasn't over one shell, I mean, one bullet, and I put the gun back in the diaper bag.

I said, "You keep this. I don't want it."

Q When you went into that store the second time you knew that, did you not, that Dennis was going to hold it up? There was going to be a holdup there?

[fol. 460] A No, I didn't know exactly there was going to be a holdup. We didn't say definitely we was going to hold it up.

Q But you had spoken about it in the car; right?

A Yes.

Q And when you held the old man in the back of the store you knew what was going on; is that right?

A I did then when the woman screamed, I knew what was happening.

Q Now, think back again to when you were in the store and the old man, you were by the old man there, did you have your pistol with you?

A I don't think so. I think I left it in Erma's diaper bag. I know I never did pull it.

MR. BORNSTEIN: Your Honor, may I approach the witness?

THE COURT: You may.

(Counsel approaches the witness and then resumes his former position.)

Q BY MR. BORNSTEIN: All right, you made out a statement quite some time ago, is that correct?

A Yes.

Q And when you made the statement out it was fresh in your mind as to the events that led up to what took place?

A Yes.

[fol. 461] Q Did you have your gun with you at the time you went in the store?

A Oh, yes.

Q And you pulled it out at the old man; is that right?

A Yes, that it when he asked me, "Oh, this is a holdup."

I said, "Yeah."

Q How did you feel after you found out that the man in the store was killed?

A I felt scared. I didn't know what to think.

Q And what did you do after you found out that the man had died?

A Well, I was trying to think over a way what to do, you know, whether to leave town or to stay and find out what happened, or what, I didn't know what to do.

Q Did you take any of the money from the robbery?

A I don't even remember. It wasn't that much. Wasn't even enough to split.

Q Did you drink anything after the robbery?

A Yes, I drank some whisky I had at the house, some of this wine.

Q Why did you drink the whisky?

What was your thought at that time?

A I just tried to get drunk and forget it.

[fol. 462] Q Did you want to think about what had happened?

A No.

Q Now, after you were taken into custody by the police you were questioned. Did you make a complete statement to the police admitting your involvement in the entire series of events?

A I don't know. I was intoxicated when the police picked me up. I don't know.

Q Later on you made a statement, did you not?

A Yes, I told them that I didn't shoot anybody.

Q But you told them about the robberies and your involvement; is that correct?

A Yes, I told them I was involved.

Q You told them the truth as best you could remember; is that correct?

A Yes.

Q Sergeant Sullivan was one of them and Sergeant Stevens; right?

A Yes.

MR. BORNSTEIN: You may cross examine.

THE COURT: Miss Obera.

[fol. 463] CROSS-EXAMINATION

BY MISS OBERA:

Q Mr. Wilkinson, where is your mother now?

A In Jackson, Mississippi.

Q And are your sisters there, too?

A Three of them. One is in college and one is married.

Q You say you received an Honorable Discharge?

A Yes.

Q From the service?

A That's right.

Q Was that a discharge under honorable conditions or straight Honorable Discharge?

A It is straight Honorable Discharge.

Q Not a general discharge under honorable conditions?

A It just said Honorable Discharge.

The officers, they have the discharge. I have it in my billfold.

Q Do you have it?

A The officers who arrested me, they have it.

Q Now, you mentioned getting in a little trouble when you got out of the Army and that a girl friend of yours involved you in some checks. Would you tell us about that. How did you get involved?

[fol.464] A Well, like I said, she was cashing some checks on this lady who she worked for at the store and the police asked her what did she do with the money and she told them, "Me and Rodney spent it." So they picked me up, too, and they picked her up.

Q Did you spend the money?

A Yeah, we went out that night, and my money was spent and hers was, too.

Q Was this woman supporting you?

A No.

Q Now, let's go back to the time when you started to talk with Guy Jones and Dennis McGautha about robberies. You say your rent was due?

A Yes.

Q You also said you were earning $2.65 an hour at that time; is that true?

A Yes.

Q Why didn't you pay your rent with your earnings?

A Well, at this time the first week they hold back on the job. You don't get a check for two weeks.

Q Over what period of time did you discuss robberies?

A This was just one night.

Q And you then went out and committed a robbery [fol. 465] the next day?

A No.

Q All right, how long had you been talking about robberies before you engaged in a robbery?

A This happened one night. We were all sitting around talking and it just come up one Friday night and I didn't see Guy any more until maybe the next week.

Q All right. And the next week, didn't you get a pay check by then?
A Yes.
Q Also, during this time Fannie Lue Smith was working; wasn't she?
A I guess so.
Q She gave you a place to stay; didn't she?
A Yes.
Q She kept food in the house; didn't she?
A Yes.
Q Well, what is this business about your rent being due?
A Well, this was where I was staying.
Q How many places were you staying at that time?
A I had one place I was staying at at 512 East 36th Street.
Q Is that Iola Henry's house?
A No, that is a room I rented.
[fol. 466] Q You were free to stay at Iola Henry's house if you wished; weren't you?
A Well, no.
Q And, how much rent were you paying?
A $11 a week.
Q You had been working pretty regularly ever since 19—strike that.
How long had you been working regularly before you committed this robbery?
A Up until about, I imagine, two weeks.
Q And then how long had you been unemployed before that?
A Before the robbery?
Q Yes.
A About two weeks before the robbery.
Q You were unemployed for two weeks?
A Yes.
Q Now before those two weeks how long had you been working regularly?
A Well, I have been—always had a job.
Q Always had a job?
A Yes.

Q Why didn't you apply for unemployment insurance when you were fired?

A I did but I didn't qualify.

Q Was it because you didn't have sufficient earnings [fol. 467] to qualify?

A No, it was—they had, I don't know, a nine-week waiting period. They disqualified me for some reason.

[fol. 468] Q When did you get the gun at Mount Olympus?

A In—let me see. It was in '66.

Q What part of '66?

A Oh, it was about four or five months before this happened.

Q Why did you keep the gun?

A Well, I was going—I don't know. I just kept it.

Q You bought some bullets for it, didn't you?

A I didn't buy some bullets. A friend of mine had some.

Q What did you plan to do with the gun after you got the bullets?

A I didn't plan to do anything but put it in my suitcase and kept it. I planned to fix it.

Q You said that there was something wrong with this gun. Would you tell us what that was?

A I don't know exactly what was wrong with it. It didn't have a clip in it, for one thing.

Q All right. When you talk about a clip, I am now holding People's 5 in evidence. Is this the kind of gun you had?

A Yes.

Q When you talk about a clip, are you talking about this part that fits into the handle of the gun?

[fol. 469] A Right.

Q This part?

A Uh-huh.

Q You put bullets in this part; is that right? This is what holds the bullets?

A Yes.

Q So you didn't have any way to hold a number of bullets in the gun?

A No.

Q But you could put one bullet in the gun, couldn't you?
A Yes, if you hold it a certain way and put it in.
Q You put that in through the top, do you?
A Uh-huh.
Q On February 14, you put a bullet in that gun, didn't you?
A Well, no, it wasn't on February 14 I put a bullet in it. The bullet had been in it from the time the guy gave me the bullet, told me he had some, and he was trying to see if it would fit.
Q So when you went into the market you had the gun, didn't you?
A Oh, yeah.
Q You had a bullet in the gun, didn't you?
A Yes.
[fol. 470] Q Why did you go in that market with a loaded gun?
A I didn't go in and shoot anybody.
Q Why did you go in there with a loaded gun?
Now, you talked about the Pon Lock Market.
Chuck's Market; you know the one I am talking about?
A Uh-huh.
Q You said, "Before I knew anything, Dennis was robbing the place." Is that the truth?
A Yes.
Q You and Dennis went in there to rob the place, didn't you?
A We went in there—we just walked in to buy some beer. We didn't know we was going to rob it.
Q Hadn't you already bought some beer, and then didn't you go back?
A That was the day before.
Q Go back to the store—when you went in there for the beer, you had your gun with you?
A This last time?
Q Yes.
A Yes, I had the gun.
Q Well, then, you knew that the purpose in going in that market was to rob it, didn't you?

A Well, no, I didn't know who was going to rob it or [fol. 471] not. We hadn't said definitely we were going to rob it.

Q You were going to rob it if there weren't a lot of people around, weren't you?

A I don't know. I guess so.

Q You were going to rob it if it seemed safe to rob it; is that right?

A Yes.

Q So it didn't really come as a surprise to you that Dennis had a gun on the lady and was asking for her money, did it?

A Well, yes, it did kind of surprise me.

Q Now, after you left Chuck's Market, you received some of the money, didn't you?

A From the robbery?

Q Chuck's Market; right.

A Yeah.

Q How much money did you receive?

A About $32.

Q Who else received money?

A Dennis.

Q Did Fannie receive any?

A No.

Q Where was the money divided?

A At the house, at Dennis' house.

Q Now, when you got $32, you had enough money to [fol. 472] pay your rent, didn't you?

A Yes.

Q Did you pay your rent?

A I paid the rent. I paid Dennis for staying there in the evening.

[fol. 473] Q Dennis didn't require you to pay rent, did he?

A No, but I did because Fannie was working every day, and I wasn't working, and Dennis wasn't working, and I thought it was only right to pay it.

Q With this stolen money?

A Pardon?

Q With the stolen money. You thought it was only right to pay them with this stolen money?

A Pay them with the stolen money?
Q I will withdraw the question.
Now, I am talking about the robbery on Venice Boulevard. You hit Mrs. Smetana with that gun, didn't you?
A No, I didn't.
Q You hear her say you hit her with the gun?
A I heard her say it, but I didn't.
Q Did you ever handle Dennis' gun?
A No.
Q Never did?
A No, I never have.
Q What did you know about the condition of Dennis' gun?
A Nothing.
Q Did it surprise you when the ballistics expert mentioned that the firing pin on that gun was broken?
[fol. 474] A No, it didn't, because this Watkins fellow in Bakersfield, when Dennis was talking about it, that the trigger or something—I mean the firing pin was chipped, and he asked Watkins where could he get it fixed, and Watkins was telling him something about it someplace, a gun store or something.
Q Now, I am going to show you this other gun, the one marked People's 3 in evidence. Is this Dennis' gun as far as you know?
A It looks like it.
Q When you made some statements to the police, you made those statements sometime after this robbery and murder, didn't you?
A Yes.
Q How long after?
A It was close to—almost a month.
Q You were sober at that time, weren't you?
A No.
Q When you talked to Sergeant Sullivan, you were sober, weren't you?
A No. I talked to—I talked to so many officers, I didn't remember.
Q All right. You were arrested up in Bakersfield?
A Right.

Q Sergeant Sullivan came up there and got you; [fol. 475] right?

A Yeah.

Q You had been in custody overnight there in Bakersfield?

A Well, they wouldn't take us back that night. They took—they waited till—they stayed, Sergeant Sullivan and Mr. Stephenson stayed overnight and they took us back the next day.

Q They questioned you the next day, didn't they?

A They questioned me. They came the same day that we was arrested. We got arrested that morning and they was there after dinner, after noon.

Q About how much time after the time you were arrested were you questioned?

A About three or four hours, I think.

Q You weren't drunk then?

A Pardon?

Q You were not drunk then, were you?

A I was—yeah, I guess I was high.

Q You understood all their questins, didn't you?

A Some of them.

Q You answered their questions, didn't you?

A Some of them.

Q They made a recording of your statement, didn't [fol. 476] they?

A I don't know.

Q Do you remember telling the officer something about the condition of the gun you had?

A Yes.

Q Do you remember being asked this question, or these questions, by Sergeant Stevens and giving these answers about a gun?

> "Q All right. Where is Dennis' gun?
>
> "A I don't know where it is. He give it to her and he said he was going to get rid of it. I said, 'I'm getting rid of mine, too. I don't want it. The pin is broken'."

Do you remember making that statement?

A No.

Q Do you remember the officer asking, "The ,38" and your reply, "Yes, it was broken", and the question, "The .38 worked all right in the market when he wanted to shoot the man", and your answer, "Yes, the pin was loose, and it broke, and I don't know who broke the pin out".

How do you know the pin was loose when the gun was fired in the market?

A Dennis told me it was loose.

Q When did he tell you it was loose?

[fol. 477] A He showed it to me. I guess he was playing around with it or something.

Q You fired the .38, didn't you, Mr. Wilkinson?

A No, I never fired it.

Q You killed Benjamin Smetana—

A I did not.

Q —and now you want to put it on Mr. McGautha?

A No, I did not kill Mr. *Spintana.*

MISS OBERA: I have no further questions.

THE COURT: Mr. Lloyd, do you have any questions of this witness?

MR. LLOYD: One or two, your Honor.

THE COURT: Let's take our recess at this time, please.

Ladies and gentlemen of the jury, bear in mind once again the admonition. It is, once again, that you are not to suffer yourselves to be addressed by any person on any subject matter of this trial, either directly or indirectly. You are not to converse among yourselves about this trial, and you are not to form or express any opinion on this phase of the trial until it has been finally submitted to you.

We will be in recess now for 15 minutes.

(Morning recess.)

[fol. 478] THE COURT: Case of McGautha and Wilkinson, I will have the record reflect the appearance in court of both defendants, all counsel, and the jury in their respective places in the jury box.

Mr. Wilkinson, would you resume the witness stand, please.

MISS OBERA: Your Honor, may I ask Mr. Wilkinson a few more questions before Mr. Lloyd begins?
THE COURT: Any objection, Mr. Lloyd?
MR. LLOYD: Certainly not.
THE COURT: All right, yes, you may.

CROSS-EXAMINATION (Continued)

BY MISS OBERA:

Q Mr. Wilkinson, if you didn't have the .38 on April (sic) 14, 1967, did you notice how Mr. McGautha was carrying it? How he got it to the store?
A Under his sweater.
Q Did you see him with that gun when you went to Pon Lock's store?
A Yes.
Q And did he put the gun under his sweater as he left the store?
A Yes.
Q Did you see him with that gun when you went into Benjamin Smetana's store?
[fol. 479] A Yes.
Q While you were in that store, did you display a gun in Mr. Smetana's presence at any time?
A No.
Q Now, when you got back to Fannie Smith's house after the second robbery, was there a time when you, McGautha, Erma Gean, and Fannie were all in a room?
A Yes, we were all in the dining room, in the dining room.
[fol. 480] Q At that time did you see Mr. McGautha remove any bullets from a gun?
A Yes.
Q Did you see him remove a shell from a gun?
A Yes.
Q Did you hear him say anything about that shell?
A No. I was talking to Erma.
Q When you were in that room did you also remove a bullet from your gun?

A I don't know. They said I did. Maybe so. I don't know. I think so.

Q You don't remember?

A It seemed like I did, and I give the gun to Erma to put it in the diaper bag.

Q How many bullets did you remove from the gun you had?

A One.

Q Was that a bullet or a shell?

A A bullet.

Q Had not been fired?

A No.

Q Would your gun, the .32, shoot?

A I don't know. I never did fire it.

Q Did you ever tell the police that it wouldn't shoot? [fol. 481] A I think he asked me would it shoot, and I told him, "I don't know. I guess so."

Q Now, do you remember Erma Gean Dupree telling the jury about her wanting to leave a motel?

A Yes.

Q You were at that motel, were you not, with Erma Gean?

A No, she didn't say she wanted to leave the motel. This was after we was on 92nd.

Q She wanted to leave the location?

A She wanted to go and get a man to bring all the furniture and the baby diapers and things over to the house.

Q Well, let's go back just for a moment. You remember after you—you didn't stay at Fannie Lue Smith's house the night Mr. Smetana was murdered, did you?

A No.

Q At that motel, did Erma Gean say that she wanted to leave?

A No.

Q Then the next night you went to another motel?

A Yes.

Q At that time did Erma Gean say she wanted to leave?

A No. She just told me, she said, "I don't know what you hiding for. You didn't do nothing."

[fol. 482] Q And did she then tell you that she would like to leave the motel?

A No. She told me—she said, "My check is here, over to *Luana's*. We can take my check and what money you got and rent an apartment, and we don't have to stay in the hotel."

Q Did you agree to do this?

A Yes.

Q After you learned Mr. Smetana had died—did you learn that from reading a newspaper?

A Yes.

Q Who was present when you were reading that newspaper?

A Erma and Dennis and myself.

Q After you found out that Mr. Smetana died, did Erma talk about leaving the motel or leaving wherever you were?

A No. She just said we was in a lot of trouble. That's all.

Q How did you feel when you learned Mr. Smetana died?

A I feel bad.

Q What do you mean, bad? How bad?

A I was hoping the man didn't die.

Q Was that because you're afraid that it might mean you would go to the gas chamber?

[fol. 483] A I didn't know—I didn't figure I could go to the gas chamber because I didn't shoot him. I didn't know what was going to happen. I knew—I just didn't know what was going to happen.

Q At that time, you didn't know that you might be in line for the gas chamber if he died; is that right?

A No, I didn't think I would. I knew I wouldn't. I felt within myself that I can't go to the gas chamber. I didn't kill him.

Q Did you ever discuss those feelings with Mr. McGautha?

A No. We never—I never did say anything about it.

Q Do you remember a time in February when John Watkins was transporting you and Mr. McGautha to Bakersfield?

A Yes.

[fol. 484] Q Was there some conversation at that time about a robbery?

A Him and Dennis was talking.

Q And was there conversation about a killing?

A Yeah, Dennis told him he had killed a man.

Q Well, did you hear somebody—No, did you, yourself, say to John Watkins that it was either the man's life or your life and you chose the man's life?

A No, Dennis told him, he said, he said—he asked Dennis, "Why you kill him?"

He said, "Well, the guy was throwing a pistol down on Rodney so I couldn't do nothing but kill him. I didn't want Rodney to die."

Q But, that man didn't have any pistol on you; did he?

A Pardon?

Q Mr. Smetana did not have any pistol on you?

A I don't know because I was holding this other man at gunpoint.

MR. LLOYD: At what?

THE WITNESS: Gunpoint.

Q BY MISS OBERA: At the time the shot was fired where were you in relation to Mr. Smetana?

A I was in back of the store. Not in back, I was sort of on the side with this gentleman and, in one of those rows, you know, how they have the aisles. We were [fol. 485] in one of the aisles.

Q Do you remember the picture that we had on the board showing the counter and the aisles?

A Yes.

Q And do you remember Mrs. Smetana testifying about where each person was about the time her husband got shot?

A Yes.

Q Now, could you, using that picture, tell us where you were?

A All those pictures were wrong. All the drawings and everything.

Q All right. Did you see any of the photographs that were introduced into evidence?

A No, I didn't look at them.

Q You say it was Mr. McGautha who said, "Let's go now?"

A Yes.

Q And what did you do at that time?

A I told him, when he hit the lady, I told him, I said, "Let's go, Man." I said, "Don't do that." I said, "Let's go."

Q You saw him hit the lady?

A When she screamed.

Q And did you look around?

A I guess so.

[fol. 486] Q Did you look?

A Yeah, I looked around because the man asked, "What is going on over there?" And I told him it was a—He said, "What is this, a holdup?" I says, "Yeah, it's a holdup."

He started over there and I told him not to go over there because he might get hurt and that is when he asked me, "You want my money?"

And I said, "No, I don't want your money, just be still."

This man lived in the back of the store. I don't know why they didn't bring him in as a witness. He could testify to the same thing.

Q You know the man?

A No, but the police officers, they know him because they mentioned his name when they was questioning me.

MISS OBERA: Your Honor, I am going to move to strike that as a conclusion of the witness.

THE COURT: That motion will be granted.

That answer will be stricken and the jury admonished to disregard that.

Q BY MISS OBERA: You say this man lives at the back of the store?

A From what the police said.

Q You weren't present when the police were ques-

[fol. 487] tioning anybody; were you?

A No, they was just—they were talking to me. They were questioning me and these things they were saying.

Q Now, what did they say about knowing the whereabouts of this man?

A They said something about a man living on Harvard Street was in the store at the time.

Q And they said—Did they say they knew the man who was in the store?

A I don't know. They was just speaking about him, the man in the store at the time.

Q I am going to show you some pictures. These are marked 6, 9, 10, 13, 14 and 16 in evidence.

Would you look at these pictures and see if any of these pictures show where you were when the shot was fired?

Mr. Wilkinson, do any of the pictures show where you were?

A I don't know, I'm not—This one, number 10 it—I was back up in this area.

[fol. 488] Q Would you just put a line on—

A Well, it doesn't show, but it was back in this area.

Q —on People's 10, and put an arrow pointing in the direction where you were.

Mr. Wilkinson, did you transact any business at the counter in Benjamin Smetana's store?

A No.

Q Didn't buy anything there?

A No.

Q Do you remember that clearly?

A Yes.

Q You were in that store twice, weren't you?

A Well, the first time I bought a carton of beer. I bought some beer and Dennis bought some beer. That was the first time we went in the store.

Q How much beer did you buy and how much beer did he buy?

A I don't know. I bought some Colt 45 and he drink—at least Fannie drink Schlitz, I think. I don't know.

Q But how much beer was it? if you recall.

A It seemed like we got three of each. It was a carton.

Q Did you hear Mr. McGautha ask about some wine, buying some wine?

[fol. 489] A He didn't buy the wine until the last—until we went to the store the last time.

Q All right. I am talking about the last store the last time. When you went in there, did you know of Mr. McGautha asking about any wine?

A I didn't know.

Q Did he buy any wine?

A Last time?

Q Yes.

A I said, "I want to get some beer."

He said he was going to get some wine, you know.

Q All right. When you went back to the car, he had some wine, didn't he?

A Yeah.

Q You say he had some newspaper?

A Yes.

Q Was money in the newspaper?

A Yeah, because some of it dropped on the street.

Q Then he also had a gun?

A Yes.

Q How was he carrying these items as you went to the car?

A I don't know because I was running trying to catch up. I don't know. Well, we both was running. I don't [fol. 490] know. I couldn't remember. We just ran and got back in the car. I got in the back seat and he got in the front.

Q But you could see this newspaper with the money as you were running to the car; is that right?

A Yes.

Q You could see the wine bottle?

A Yes.

Q Could you see the gun?

A Yes. Well, he had the gun up under his shirt, his sweater.

Q All right. From the time Mrs. Smetana was struck until the time the shot was fired, how much time elapsed?

A From the time—

Q You remember the lady screaming?

A Yes.

Q Then you remember a shot being fired?
A Yes.
Q How much time was there between those two incidents?
A I don't know. Dennis and the man was arguing about something.
Q No. Excuse me for interrupting you. The question is just this: How much time was there between these two things, the woman screaming and the shot [fol. 491] being fired?
A About a minute.
Q What were you doing during that minute?
A Standing up there with the man.
Q All right. When the lady screamed, what did you do next, as soon as she screamed?
A Well, the man, he said, "What's going on over there", and he started walking toward—around toward her, you know, to see what was happening. He was trying to see what was happening, and I told him not to move, to stay there.
Q Did you have a gun pointed at him at that time?
A Yeah. That's when I pulled my gun. He asked me was this a robbery, and I said, "Yeah."
Q So you were not holding the man, then, by both his shoulders?
A I held him like that.
Q You had only one hand that would be visible—
A Yes.
Q —to somebody behind you; is that right?
A Yes, ma'am.
Q When you said "Like that", you mean that you had your left hand on his shoulder and you were holding the gun in your right hand?
A I don't know how I had it. I was just holding [fol. 492] the man at gun point.
THE COURT: Miss Obera, let's take our noon recess at this time.
You may step down.
Ladies and gentlemen of the jury, please once again bear in mind the admonition about talking about this case to anyone or letting anyone talk to you about it,

or talking about the case among yourselves. Certainly, you are not to form or express any opinion on this matter until it has been finally submitted to you.

We will be in recess now until 2:00 o'clock this afternoon. See you back here at that time.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock, same day.)

[fol. 493] LOS ANGELES, CALIFORNIA,
WEDNESDAY, AUGUST 23, 1967, 2:10 P.M.

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THE COURT: All right, the case of People versus McGautha and Wilkinson, I will have the record reflect the appearance of both defendants, the presence of all counsel, and the jury in their respective places in the jury box.

Mr. Wilkinson, would you please resume the witness stand.

At our recess I believe we got to the point, Mr. Lloyd, where you were going to inquire of this witness.

MR. LLOYD: I believe Miss Obera had asked leave of the Court to continue, your Honor.

At the time we recessed she was still cross-examining Mr. Wilkinson.

THE COURT: Do you have any further questions, Miss Obera?

MISS OBERA: Yes, your Honor.

WILLIAM RODNEY WILKINSON,

called as a witness by and on his own behalf, having been previously duly sworn, being the witness on the stand at the time of the noon adjournment, resumed the stand, was examined and testified as follows:

[fol. 494]

CROSS-EXAMINATION (Continued)

BY MISS OBERA:

Q Mr. Wilkinson, what did you do with your gun after the murder?

A I put it in the trash can.
Q Where was that?
A At 92nd and Compton. 92nd and, yeah, I think it's Compton.
Q Is this at the apartment that you had with Erma Gean Dupree?
A Yes.
Q And what did Mr. McGautha do with his gun, if you know?
A I don't know. I think he had it.
Q Did you ever see his gun again after that day of the murder?
A It was in the packages.
Q What packages?
A The packages that we took to Bakersfield.
MISS OBERA: I have no further questions.
THE COURT: Mr. Lloyd?
MR. LLOYD: Thank you, your Honor.

[fol. 495] CROSS-EXAMINATION

BY MR. LLOYD:

Q Mr. Wilkinson, did you have a gun when went to the market, Mrs. Lock's market, on Wall Street?
A Yes.
Q Did you have a gun when you went to the second market?
A Yes.
Q When you hold your gun in your hand, what hand do you hold it in, your right hand or your left hand?
A I don't know. I am left-handed. I guess I hold it in my left hand.
Q Did you strike Mrs. Smetana with People's 3 for identification?
A No.
Q Did you point a gun at Mrs. Smetana at all?
A No.
Q Did you point a gun at Mr. Smetana at all?
A No.
Q When did you first see People's 3 for identification?

A When I met Dennis over to Guy's house.
Q When was that, approximately?
A In February. No. No, it was late in January.
Q Are you sure about that now? Think about it.
[fol. 496] A Yes—well, yes, I'm sure about it.
Q As a matter of fact, Mr. Wilkinson, didn't you tell the police officers that Mr. McGautha had fired People's 3 for identification on New Year's Day?
A Yes.
Q So you had seen it before late January, hadn't you?
A Well, about the same time. It was in that time period.
Q Well, New Year's Day comes customarily on January 1st, doesn't it?
A Yes.
Q Now, on February 14, 1967, do you know whether or not that .32 caliber gun that has been referred to in this proceeding as your gun, whether or not it was capable of shooting?
A No, I don't.
Q Did you have a round of live ammunition in People's 5 for identification on February 14, 1967?
A A round of ammunition?
Q Yes, sir.
A I had one bullet.
Q Now, do you recall this question being asked of you by the police?

"Q As a matter of fact, you had a bullet in the chamber, didn't you?
[fol. 497] "A No, I didn't have no bullet."

Do you recall that question being asked of you by the detectives, and do you recall giving that answer?
A I don't know. Maybe I did.
Q Do you recall ever telling the police that you ever kept Mr. McGautha's gun, referring to People's 3 for identification?
Q Did I tell them I kept it?
Q Yes, sir.
A No.

Q Do you recall this question being asked you by the police officers?

"Q Where did he get that gun, do you know?
"A A long time ago, ever since I knew him, he had it. It was in the glove compartment, and I kept it."

A Yes, sir.
Q Do you recall saying that?
A No.
Q How much beer did you purchase in that market over on Venice Boulevard?
A A carton of beer.
Q Did you actually get it?
A Yes, we got it.
[fol. 498] Q Pardon?
A Yes, we got it.
Q Now, when Mr. McGautha—who left the store first on Venice Boulevard, you or Mr. McGautha?
A Mr. McGautha.
Q Pardon?
A Mr. McGautha.
Q You sure about that?
A Uh-huh.
Q Do you recall this question being asked of you by the policeman?

"Q All right. And do you state that you ran out before Dennis did?
"A Yes, sir."

Do you recall that question being asked of you and recall giving that answer?
A I don't know. They asked me that three or four times. I don't know.
Q Well, now, as a matter of fact, Mr. Wilkinson, just take your time. You are under oath and this is a very important proceeding. Who left the store first, you or Mr. McGautha?
A Dennis left the store first.
[fol. 499] Q Well, do you recall telling the police officers that you ran out first?

A I don't know.
Q Pardon?
A I don't know.
Q When Mr. McGautha left the store what did he have?
A A bottle of wine and a newspaper.
Q Did he have some money?
A Some money fell out when he was running, some change.
Q Did he count any change with you after you arrived back at Fannie Lue Smith's house?
A I don't know.
Q Did he have a gun also?
A Yes.
Q He had all these things in his hand?
A He had the gun under his sweater.
Q What did you say he had again? Take your time and tell the Court and jury what he had.
MR. BORNSTEIN: Objection, it has been asked and answered.
MR. LLOYD: Well, this is cross-examination. A lot of things have been asked and answered.
THE COURT: I will overrule the objection. I will permit the question to be asked and answered again.
[fol. 500] THE WITNESS: What did he have?
Q BY MR. LLOYD: Yes.
A Oh, he had a bottle of wine and newspaper.
Q He had the change wrapped up in a newspaper?
A A man put the money—He had a stack of newspapers like this, and he put the money on this. I guess he just wrapped it up.
Q Tell us again how the man put the money in the newspaper.
A I don't know how he put it in there. He laid the money on the counter, I guess.
Q Now, what man was that that put the money in the newspaper?
A I guess the man who got shot.
Q You got a six-pack of beer; is that correct?
A That's right.

Q Do you recall telling the police officers you didn't get any beer, Mr. Wilkinson?

A No, I told them I went to the store and got some beer.

Q "Q All right, you stated when Dennis came out he had the change, some change wrapped up in a newspaper?

"A Yes.

"Q And did he have some wine or some beer?

[fol. 501] "A Yes, he had some wine.

"Q What kind of wine?

"A California Tawny Port.

"Q What type of beer?

"A I didn't get any beer."

Do you recall telling the officer that, Mr. Wilkinson?

A This was the first time I got beer. The second time I left the beer right there where I was standing with the man. I didn't get any beer.

Q Thank you for that explanation.

The first time you went in there did the man put any money, any change in a newspaper and wrap it up for Mr. McGautha?

A Pardon?

Q The first time you went in that store, did Mr. McGautha leave that store with some change wrapped up in some newspaper?

A He left with a newspaper and a bottle of wine and when we got home—

Q The first time you went in the store in Venice?

A No, the second time.

Q All right. Now, I am talking about the second time. That is when Mr. McGautha left with the change in the newspaper; isn't that correct, Mr. Wilkinson?

[fol. 502] A Second time.

Q All right, now I will ask you if you were asked these questions and if you gave these answers.

"Q All right, you stated when Dennis came out he had the change, some change wrapped up in a newspaper.

"A Yes.

"Q And did he have some wine or some beer?
"A Yes, he had some wine.
"Q What kind of wine?
"A California Tawny Port.
"Q What type of beer?
"A I didn't get any beer."

Now, as a matter of fact, the first time you went into the store you got some beer; didn't you, Mr. Wilkinson?

A Sure, I got some beer and Dennis got some beer, too, and we left and went out.

MR. BORNSTEIN: Pardon me, Mr. Wilkinson.

Objection, your Honor. I ask that question be stricken on the basis that it is an improper question. It is not conforming with the proof. Mr. Lloyd is confusing, or trying to confuse the witness with the second incident and the first incident.

This statement is right in line with what he [fol. 503] said.

THE COURT: Wait a minute. The objection will be overruled. I will permit the answer to stand.

Q BY MR. LLOYD: All right, so there will be no confusion, the first time you went into the market on Venice Boulevard on February 14, 1967, the two of you purchased some beer; is that correct, sir?

A That is correct.

Q He didn't buy any Tawny Port Wine at that time; did he?

A No, we got some beer. He got some beer for Fannie. I got some beer for myself.

Q All right. There was no wine purchased the first time; is that correct?

A That is correct.

Q And the second time when you came in you told the officers, and I am going back to the question now again,

"Q All right, you stated when Dennis came out he had the change, some change wrapped up in a newspaper.
"A Yes.
"Q And did he have some wine or some beer?
"A Yes, he had some wine.

"Q What kind of wine?
"A California Tawny Port.
[fol. 504] "Q What type of beer?
"A I didn't get any beer."

A I never got a chance to take the beer out of the store. I went to the cooler and got some beer and then there was this man getting some Coors out and that is when the woman screamed.

Q Now, didn't you just testify before I started this line of questioning that you did get some beer, Mr. Wilkinson?

A I never did say I taken it out.

MR. BORNSTEIN: Objection, your Honor, as to which trip into the store.

THE COURT: I will sustain the objection on that question on the ground it is argumentative.

[fol. 505] Q BY MR. LLOYD: Now, when you left that store, still talking about the store on Venice Boulevard, who was driving?

A Fannie—

MR. BORNSTEIN: Objection again, your Honor, as to which trip out of the store?

MR. LLOYD: I am talking about the second trip.

THE COURT: The objection will be overruled. You may answer that question.

THE WITNESS: Fannie was driving.

Q BY MR. LLOYD: When you went to the store the first time, who was driving?

A Fannie.

Q We are talking about the store on Venice Boulevard?

A Yes.

Q (Reading)

"Q All right. So when you and Dennis got back in the car, which car did he get into?
"The same.
"The same white Pontiac?
"A Yes.
"Q Who else was in that car?
"Fannie and Erma and two kids.

[fol. 506] "Fannie, Erma, and Erma's two kids?

"A Yes.

"Now, by Erma, what Erma are you talking about?

"A Erma Dupree.

"Q Erma Gean Dupree?

"A Yes.

"Q And who was driving?

"A Dennis."

THE COURT: Mr. Lloyd, you merely read something. You didn't ask your question, if that was a question.

MR. LLOYD: Thank you very kindly, your Honor.

Q Mr. Wilkinson, do you recall those questions being asked and do you recall giving those answers?

A Yeah, I guess those are the questions—I mean my answers.

Q Did the man you were talking to now in the store, that you say you were talking to, did he have any beer?

A He had a six pack of Coors.

Q How much did he have?

A Six pack of Coors.

Q You sure it was only a six pack?

A That's right.

[fol. 507] Q You recall this question by the police officers?

"Who was that man?

"He was kind of an elderly man, about 65 years old, and he had a big stack of beer under his arm."

Do you recall telling the officers that, that he had a big stack of beer under his arm?

A I don't know if it was in those words, but I told them he had a six pack of beer.

Q Now, Mr. Wilkinson, did you know that this pin on People's 3 for identification was broken on February 14, 1967?

A No, it wasn't broken.

Q How do you know?

A Because Dennis was looking at it.

Q You know the pin wasn't broken on People's 3 for identification on February 14; is that right?
A On February 14, I don't know, but this one—
Q The day the man was killed on Venice?
A No, I don't know. I hadn't looked at it. We talked about it on the way to Bakersfield.
Q Do you recall the officers asking you this question?

"All right. Where is Denny's gun?
"A I don't know where it is. He give it to her.
[fol. 508] He said he was going to get rid of it. I said, 'I'm getting rid of mine, too. I don't want it. The pin is broken.' "

Do you recall telling the officers that?
A I didn't tell them the pin was broken.
Q You don't recall telling the officers—
A Not that I said that.
Q —Sergeant Sullivan, the pin is broken.
A Not that my pin was broken.
Q You didn't say, "I said, 'I'm getting rid of mine, too. I don't want it. The pin is broken.' "?
A I told them that's what Dennis said. He said he was going to sell it.
Q Let me read you back the question and the answer.

"Where is Denny's gun?
"I don't know where it is. He give it to her. He said he was going to get rid of it. I said, 'I'm getting rid of mine, too. I don't want it. The pin is broken.'
"Q The .38?
"A Yes. It was broken."

Do you recall that question and answer, Mr. Wilkinson?
A Telling them that that's what Dennis said, yes.
[fol. 509] Q Now, Mr. Wilkinson, you aren't kidding anybody.

I will strike that, your Honor. I am sorry, Mr. Bornstein. The temptation is great. I am very sorry about that.

Mr. Wilkinson, let's go back here again.

"All right. Where is Denny's gun?

"I don't know where it is. He give it to her. He said he was going to get rid of it. I said, 'I'm getting rid of mine, too. I don't want it. The pin is broken.'

"Q The .38?

"Yes, it was broken.

"Q The .38 worked all right in the market when he wanted to shoot the man?

"A Yes. The pin was loose and it broke, and I don't know who broke the pin out."

Do you recall that, Mr. Wilkinson?

A I don't know.

Q Now—

A The police asked me where was my gun, and I told them I got rid of it, and they asked me about Dennis' gun.

Q What did you tell them?

A I told them, "I don't know what he did with it. [fol. 510] He gave it to Fannie. So Fannie gave it back to him."

Q That's right.

A That's when he was showing it to Watkins that the pin was broken. That's when I found out that it was broken, too. He had said something about the pin was loose, and it wasn't. It was still usable.

Q It was still usable?

A That's what he said.

Q Mr. McGautha told you the pin—the gun was still usable?

A Yes.

Q Now, have you ever seen Mr. McGautha shoot People's 3 for identification before that time?

A Before New Year's?

Q Well, I was referring to February 14, but let me ask you this: Did you see him fire it on New Year's night?

A Yeah, he fired it New Year's night.

Q Now, you told the officers that Mr. McGautha had fired this gun New Year's night; is that correct, sir?

A Yes.

Q All right. This was after the officers told you they had found a cartridge outside the window at Mrs. Smith's house; isn't that correct?

A I don't—you say they found a cartridge?

Q Yes, sir.

[fol. 511] A Yeah, I remember telling him they found a cartridge.

Q Now, when he got back to Mrs. Smith's home on February 14, 1967, the day a man was killed, did you also see him with an empty shell?

A Yes.

Q Did you see what he did with that empty shell?

A No, I didn't.

Q How long had you been at Mrs. Smith's home before you saw that empty shell?

A I had just got back and set down.

Q Well, how long had you been in the house before you sat down?

A We walked right in and sat down at the dining room table.

Q Now, do you recall the police officer asking you this question?

> "Before you got back to the house, Dennis took the empty cartridge that he had shot the man with, he took the empty cartridge and threw it out the window?
>
> "A Yes."

Do you recall telling the officers that, Mr. Wilkinson?

A And Fannie told him not to throw it out the window.

[fol. 512] Q Well, now, do you recall that question being asked and you giving that answer to the police officers?

A I told them he started to throw it out the window. Now, whether he threw it out, I didn't know.

[fol. 513] Q All right, now. I would appreciate a yes or no answer. Just listen to the question and then answer it.

"Q Before you got back to the house Dennis took the empty cartridge that he shot the man with, he took the empty cartridge and threw it out the window."

Q Do you recall the officer asking you that question?
A Yes.
Q And do you recall giving the answer yes?
You are nodding your head?
A Yes.
Q Now, was this .32, the one that you had picked up at this man's house, was that the first gun you had owned?
A Picked up at the man's house?
Q Well, the man that you worked for on Mount Olympus in Hollywood somewhere, the .32 caliber gun we talked about, was that the first gun you owned?
A No, I owned a .22 rifle when I was a teenager. I used to go hunting with my uncle.
Q Was that the first pistol, so to speak, that you had ever owned?
A Yes.

[fol. 514] Q All right, as a matter of fact, Mr. Wilkinson, you had a .22 caliber pistol, didn't you?
A No, I never owned a .22 caliber pistol.
Q Didn't you go to jail for a .22 caliber gun?
A Never.
Q All right. Do you recall these questions being asked by the police and these answers given by you:

"Q Now, you are sure that we can't get our hands on those guns?
"A Yes, sir, I am positive.
"Q Let's put it this way: Obviously we can't get our hands on them. You sure you can't help us locate either one of those guns?
"A No, sir.
"Q Would you, if you knew where they were?
"A Yes, sir, I would.

"Q We got a little pistol from this girl that you lived with on 43rd Place.

"A Yes.

"Q Would you tell us about that gun?

"A Nothing much. Ain't too long ago got the [fol. 515] gun back from the police station. I went to jail for it."

Now, do you recall that question and that answer?

A Iola, she's in court now. She can tell you she went to jail for it. It's her gun.

Q Did you go to jail for it?

A No, I never owned it. She got caught with the gun, I didn't.

Q Well, did you tell the police, "I went to jail for it?"

A This was before I was even living with her then.

Q Was this another gun you are talking about now?

A Talking about the same one I was referring to when I was talking about it with the police.

Q Did you tell the police, "I went to jail for it," Mr. Wilkinson?

A No.

Q Now, do you recall—

So there is no confusion, but we do say, "I went to jail for it," do we not?

(Counsel addresses this remark to the investigating officer, Sergeant Sullivan.)

Q BY MR. LLOYD: Mr. Wilkinson, had you been [fol. 516] drinking quite a bit on February 14, 1967?

A I had been drinking some beer mostly.

Q Pardon?

A I had been drinking beer.

Q Were you drunk when you walked into the market the second time on Venice where the man was killed?

A No, I wasn't drunk.

Q What hand were you holding the gun in—strike that.

Where was this, your gun, the automatic type when you were in this second market?

A Right here in my back, against there.

Q Did you ever take it out?
A Yes, when the man started going over toward the counter, trying to go over from the beer cooler.
Q And you say the entire diagram the way she has the diagram is incorrect; is that correct, sir?
A Well, in my eyes it looked like it was.
Q How old a man are you, Mr. Wilkinson?
A Twenty-six.
MR. LLOYD: I have nothing further, your Honor.
THE COURT: Anything further?

[fol. 517]

REDIRECT EXAMINATION

BY MR. BORNSTEIN:

Q Mr. Wilkinson, in this transcription of the tape where it says, "I had a .22," when you spoke to the police did you say that Iola had the .22?
A Iola.
Q So, therefore, it appears to be an obvious mistake; is that correct?
A Yes.
MR. LLOYD: Well, your Honor, that appears to be a mistake, it is there for what it's what. He can testify to what it is. He can't say it is a mistake.
THE COURT: Is there an objection?
MR. LLOYD: Yes, your Honor.
THE COURT: The objection will be sustained to that question.
Q BY MR. BORNSTEIN: Now, with reference to the .38 caliber gun, you said that Dennis gave it to Fannie; is that right?
A Yes.
Q And when you were in the market, the only other person that had a gun in there, as far as you knew, was Dennis McGautha; is that right?
A That's right.
Q And when the police talked to you, as far as you knew, this was the only gun that was fired; is that [fol. 518] right?
A That's right.

Q When you told the policemen the .38 worked all right in the market when he wanted to shoot the man, who were you talking to the policeman about when you said that .38 worked all right in the market when he wanted to shoot the man?

MISS OBERA: Objection, that calls for a conclusion, your Honor.

THE COURT: I am going to sustain the objection, Reword the question.

Q BY MR. BORNSTEIN: You told the policeman that the .38 worked okay in the market. How did you know it worked okay in the market?

A Because Dennis shot it.

Q And the only other gun you knew of in the market was this one, People's 3?

A That's right.

Q Now, with reference to the statement of "The pin is broken," what was your answer there? What was it? Why did you say that or did you say that, if you remember?

A Well, the police was asking me about where the guns were, so Dennis had already asked this guy Watkins in Bakersfield where was a good gunsmith where he could get his gun fixed, that when he shot the gun it [fol. 519] broke, and then he, Dennis, said, "No, I think I will sell it, I need the money."

Q What kind of clothes were you wearing on the 14th of February of this year?

A A shirt and a pair of trousers.

Q What color was the shirt?

A Dark beige, I guess.

MR. LLOYD: Dark what?

THE WITNESS: It was a yellow long-sleeved shirt.

MR. LLOYD: Does the record reflect beige?

THE COURT: Dark beige.

MR. LLOYD: Dark beige. Thank you, your Honor.

Q BY MR. BORNSTEIN: And what were you wearing on the bottom?

A A pair of dark trousers.

Q But you remember what Dennis was wearing; is that correct?

A He had on a shirt and a pair of trousers and a sweater.

Q And had he had the same sweater on earlier at Pon Lock's market? Did he change clothes from Pon Lock's market over to the market on Venice?

A I don't remember.

Q Now, you said some change fell out of the newspaper that Dennis was carrying. Did you pick that change up?

[fol. 520] A No, I was running behind him, you know. This change fell and that is how I know there was some change. The change come from somewhere.

Q Now, in the statement it says that there was, "He had a big stack of beer under his arm."

When you spoke to the police, do you remember stating he had a six pack rather than a big stack?

A Yes.

Q Did you hear the tape recording at any time?

A No.

Q And do you know whether or not this is an accurate representation of a transcript of what was said on that tape?

A I don't know. Some of those things seem to be twisted around.

Q Some of them appear to be a little different?

A Yes.

Q But you do remember clearly about the gun where it says here, "I went to jail," that you did not say, "I," you said, "Iola;" is that correct?

A Right.

Q Now, is there anything else you remember about the description of this man that was back by the refrigerator?

A Yes, he was sort of old, old man with a—he was tall and he had kind of a heavy, you know, he looked [fol. 521] like he had put on fat, you know. I'd say he weighed about 215.

Q And did you tell the police at the time you spoke to him about the old man?

A Yes.

Q And did you describe him as best you could?
A Yes.
Q Now, in talking about this .32 caliber gun, that is the gun that you got in the glove compartment of the truck that you were using; is that right?
A Yes.
Q And that gun you stated had no clip in it and was broken, the handle was broken; right?
A Right.
Q And you had never fired the gun?
A No.
Q Did you ever know of Dennis to practice with it or fire it?
A No.
Q So you don't know whether or not he had ever used it; is that right?
A No.
Q But you do remember seeing Dennis with a gun that looks like this; is that right?
A Yes.
Q More than once?
[fol. 522] A Yes.
MR. BORNSTEIN: I have nothing further.
THE COURT: Miss Obera, anything further?

RECROSS-EXAMINATION

BY MISS OBERA:

Q To your knowledge, did Mr. McGautha keep this gun or a gun like this in the glove compartment of a car?
A Yes, sometimes.
Q And what car was that?
A His Cadillac.
MISS OBERA: Nothing further.
THE COURT: Mr. Lloyd, anything further?
MR. LLOYD: I have nothing further. Thank you, your Honor.
THE COURT: You may step down.
Call your next witness.

MR. BORNSTEIN: I'd like to call Officer Brimmer.

THE COURT: Officer, step around here, please, where you can see the sign on the witness stand, raise your right hand and be sworn.

THE CLERK: Would you please be sworn, sir, by reading aloud the oath as you see it there before you.

THE WITNESS: I do solemnly swear the testimony I shall give in this case—excuse me, in this cause now [fol. 523] pending before this Court shall be the truth, the whole truth and nothing but the truth, so help me God.

THE CLERK: Be seated, please, sir.

EDWARD D. BRIMMER,

called as a witness by and on behalf of the defendant Wilkinson, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q Mr. Brimmer, may I ask you to state your full name and spell your last name for the record?

A My name is Edward D. Brimmer, B-r-i-m-m-e-r.

Q And may I ask what your business or occupation is?

A I'm a police officer for the City of Los Angeles, presently assigned to the Wilshire Patrol Division.

Q How long have you been a police officer?

A Approximately three and a half years.

Q Directing your attention to this courtroom at what time were you working undercover as a police officer and did you meet somebody that is connected with this case?

A Yes, I did.

[fol. 524] Q And who did you meet?

A I met the defendant, Dennis McGautha.

Q Would you point that man out for the Court, please, and for the jury.

A The defendant sitting there next to Mr. Lloyd, in the white shirt.

MR. BORNSTEIN: May the record indicate this officer has identified Dennis McGautha, your Honor?

THE COURT: Yes.

Q BY MR. BORNSTEIN: What were the circumstances that you met Mr. McGautha under? What were you doing at that time?

A I was involved in a—conducting an investigation for narcotics in the south end of Los Angeles, primarily south of Florence, and I met an individual by the name of Guy Jones who I became very friendly with, and the relationship led to numerous dealers in narcotics—

MR. LLOYD: Just a moment. May that be stricken and the jury instructed to disregard this, your Honor, unless—this doesn't tell how he met Mr. McGautha. Certainly he doesn't have to tell who he met to see how he met Mr. McGautha. I think it is highly prejudicial and I do think it should be stricken.

THE COURT: The latter portion of the answer will be stricken, and the jury will be admonished to disregard it.

[fol. 525] Q BY MR. BORNSTEIN: All right. You met Mr. Guy Jones. Did you meet Mr. McGautha through Mr. Jones?

A Yes, sir, I did.

Q Did you ever meet Mr. Wilkinson?

A No, I did not.

Q That's the man at the far end of the table. Have you ever seen him before coming to court today?

A No, sir, I have not.

Q I have a gun here that's marked People's 3 for Identification. Would you look at that weapon, please. Look familiar to you?

A Yes, it does.

Q When and where did you first see this gun?

A I saw this gun in a house that Mr. McGautha was living in.

Q Were you living there with him at that time?

A I was not living in the house with him. I did spend quite a bit of time there, yes.

Q How many times did you see this weapon marked People's 3 for Identification—People's 3 in evidence? I am sorry.

A I saw the weapon on many occasions.

Q Where did you see it on all the times that you saw it?

A One occasion I saw the weapon, I came to the [fol. 526] house, it was under the pillow. He was in bed sleeping and the gun was directly under the pillow. On another occasion, the gun was on a mantle in the living room area, and, as I recall, Mr. McGautha had the gun on his person on one of the occasions that I saw him with a gun.

Q Did you ever see him doing anything with this gun other than having it in his presence?

A Well, through conversation with myself and the other person—

MR. LLOYD: Your Honor, may this be stricken as non-responsive? The question is did you see, not what you heard.

THE COURT: The answer will be stricken as not responsive.

Q BY MR. BORNSTEIN: Did you see Mr. McGautha ever doing anything with this gun?

A Yes, I did.

Q What did you see him doing with it?

A Mr. McGautha was demonstrating to myself and the other person with me how he could take the gun out and how fast he was taking the gun from the waistband.

Q Where did he usually carry this gun?

A The gun was carried in his waistband, normally, to the front near the crotch area.

Q Did he demonstrate his quick-draw ability to you? [fol. 527] A Not to me, directly, but in that fashion, yes.

Q By stating that he—

A Yes.

Q I see. Did you ever see him use this gun?

A No, I did not.

MR. BORNSTEIN: You may cross-examine.

MR. LLOYD: I have no questions of this officer. Oh, one question.

MR. BORNSTEIN: I am sorry.

Q When was this that you saw him with relationship to People's 3?

A This, sir, to the best of my recollection now would be approximately three years ago, in 1964, the latter part of July, to, I would say, approximately the first of September.

Q So how can you identify this particular gun?

A The one significant thing about the gun that I remember was the fact that it was on older break-open model. The impression that I got from listening to Mr. McGautha talk about the gun was that he was fairly fond of the gun and, to say the least, when I was there in the function that I was in, with him having a gun, I was somewhat concerned about the gun, so I didn't—

Q I am sorry?

[fol. 528] A That's—

Q Did you ever see him let anybody touch or use this gun?

A No, I did not.

MR. BORNSTEIN: Thank you. You may cross-examine.

THE COURT: Mr. Lloyd.

CROSS-EXAMINATION

BY MR. LLOYD:

Q Officer, as a matter of fact, the new Richards guns open the same way, don't they?

A I am not sure, Mr. Lloyd.

Q You don't know at all, do you?

A No, I don't. No.

Q You don't know who had that gun on February 14, 1967, at about between 5:00 and 6:00 o'clock, though, do you?

A No, sir, I do not.

MR. LLOYD: I have nothing further, your Honor.

THE COURT: Miss Obera.

CROSS-EXAMINATION

BY MISS OBERA:

Q Did you ever discuss the gun with Mr. McGautha?

A As I said before, the conversation was between [fol. 529] myself and—

MR. LLOYD: Just one minute. May that be stricken? The question can be answered yes or no.

THE COURT: The answer will be stricken as not responsive.

THE WITNESS: In response to the question, then, yes,

Q BY MISS OBERA: Was there something in this conversation which led you to believe Mr. McGautha was fond of the gun?

A Yes, it was.

Q What did he say about it?

A As I said before, he was demonstrating to me the use of the gun and how he efficient he was with the gun, and, particularly, in taking the gun from the waistband.

Q Did you actually see him take the gun from the waistband?

A Yes, I did.

Q Then did he return the gun to the waistband?

A Yes, he did.

Q Were you impressed by his proficiency at removing it?

MR. LLOYD: Just one moment. I object. It has no probative value, that he was impressed.

[fol. 530] THE COURT: I will sustain the objection.

MISS OBERA: I have no further questions.

THE COURT: Mr. Lloyd, anything further?

MR. LLOYD: No, certainly not. Thank you.

THE COURT: Mr. Bornstein?

MR. BORNSTEIN: Nothing more. Thank you.

THE COURT: Officer, you may step down. You may be excused from further attendance. You are welcome to remain here if you care to.

MR. BORNSTEIN: I would like to call Iola Henry.

THE CLERK: Raise your right hand and be sworn by reading the oath aloud as you see it there before you.

THE WITNESS: I do solemn swear to testify that I shall give in the cause pending before the Court shall be the truth, the whole truth, so help me God—nothing but the truth, so help me God.

THE CLERK: Be seated, please. State your full name, please.

THE WITNESS: Iola Henry.

THE CLERK: Spell the first name, please.

THE WITNESS: I-o-l-a.

THE CLERK: The last name?

THE WITNESS: H-e-n-r-y.

THE CLERK: Thank you.

[fol. 531] IOLA HENRY,

called as a witness by and on behalf of the Defendant Wilkinson, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q Mrs. Henry, do you know Mr. Wilkinson?

A Yes.

Q How long have you known him?

A Since '65.

Q Now, I want to ask you an incident about a .22 caliber gun. Do you know anything about that gun?

A Yes. It is mine.

Q Did Mr. Wilkinson ever have this .22 caliber gun?

A No. No, he never touched it.

Q Did you go to jail or something over this gun at one time?

A Yes, I did, because I hide the gun when the police—I broke—they had the shotguns on me, broke in my door, had my door kicked down, and when I went home I picked up my things from over to another room, and my gun was in the things when I had it, and that's when they charged me with my gun.

Q This was during the investigation when they were [fol. 532] looking for Mr. Wilkinson?

A Yes. I didn't know where he was, and I was telling them that he didn't live with me and he wasn't there, he didn't sleep there.

MISS OBERA: I object.

MR. LLOYD: I join, your Honor. There is no question pending.

THE COURT: All right. Ask your next question.

Q BY MR. BORNSTEIN: This is the incident about the gun, it was not Rodney's, he never had it; is that correct?

A No, he has never had the gun.

Q All right. Now, in knowing Rodney, at one time was he living with you?

A Yes, he was.

Q You had an opportunity to observe him. How did he conduct himself as far as which hand he used when he would do things?

A Left-handed.

Q What did he do with his left hand?

A I know he wrote with it and everything, you know, just like I use my right hand, like you use the right hand, he'd use his left hand.

Q All right. What kind of a person was Mr. Wilkinson as far as going to work and working steadily when you were with him?

[fol. 533] A Well, he was good at that, going—going to work and going to church.

Q Did you go to church with him?

A Yes, I did. When I wouldn't go, he would get mad and go himself without me, and I wouldn't get up.

Q Did he go to church that Reverend Davis was conducting?

A Yes.

Q Did he go to any other church that you know of?

A Yes. He go to other churches, too.

Q During the time that you were with him, did you ever observe him doing anything of a violent nature as far as using a weapon or anything like that?

A Not as I know, sir.

Q Any time that you were with him, did you observe him—I am sorry. May that question be stricken, your Honor.

After there was a period of time when he left you; is that correct?

A Yes, there were.

Q At that time after he left, you became a little bit mad at him; right?

A Yes, I was.

Q Did you want to have anything to do with him after he left you?

[fol. 534] A No, I didn't.

Q Why was this?

A Because I told him I didn't like the friends that he was running with, and I didn't want to have anything to do with them.

Q When was this in relationship to the months of this year or last year?

A That was end of December.

Q December of last year?

A Uh-huh, of last year, December.

MR. BORNSTEIN: You may cross-examine.

THE WITNESS: It was—

THE COURT: Miss Obera.

CROSS-EXAMINATION

BY MISS OBERA:

Q Mrs. Henry, was Erma Gean Dupree one of the friends of Mr. Wilkinson of whom you disapproved?

A I didn't know her. I never—

Q So your answer, then, would be no?

A No, I didn't know her. I didn't know anything about her.

Q What friends did you disapprove of?

A Dennis McGautha.

Q So you don't like Mr. McGautha?

A Well, it's not a—it's not a case of don't

[fol. 535] like.

MR. LLOYD: Just one moment, please.

THE COURT: You can answer that question without volunteering any information.

THE WITNESS: Oh, what you mean, like yes or no?

THE COURT: Yes.

THE WITNESS: Well, no.

Q BY MISS OBERA: You said that Mr. Wilkinson was good at working when he stayed with you?

A Yes, he were.

Q Isn't it true that he was unable to work when he stayed with you?

A What you mean by unable?

Q Wasn't he—hadn't he been shot and wasn't he sick when he stayed with you?

A Oh, well, that was just for a while he was, you know, how that is. I mean, you know, when he was sick.

Q How long was he sick?

A Oh, I don't know; a couple of months or something. I don't remember.

Q What was your relationship to Mr. Wilkinson?

A I was his old lady, and he was my old man.

Q Did you live with him as his wife?

A Yes, uh-huh.

MISS OBERA: I have no further questions.

[fol. 536] THE COURT: Mr. Lloyd, do you have any questions of this witness?

MR. LLOYD: No, your Honor, I have no questions of Mr. Wilkinson's girl friend.

MR. BORNSTEIN: That's all. May this witness be excused?

THE COURT: Yes. You may step down.

You may be excused from further attendance. You may stay here if you care to.

THE WITNESS: Thank you.

THE COURT: Call your next witness, please.

MR. BORNSTEIN: Mr. Davis.

THE CLERK: Would you raise your right hand, sir, and be sworn by reading the oath aloud as you see it there before you.

THE WITNESS: I do solemnly swear the testimony I shall give in this cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help me God.

THE CLERK: Be seated, please. Would you state your full name.

THE WITNESS: Charles Henry Davis, Junior.
THE CLERK: Spell the last name, sir.
THE WITNESS: D-a-v-i-s.

[fol. 537] CHARLES HENRY DAVIS, JR.,

called as a witness by and on behalf of the defendant Wilkinson, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q Now, what is your business or occupation?
A I'm a minister of the Baptist Church.
Q Are you an ordained minister?
A Yes, I am.
Q Directing your attention to Mr. Wilkinson, do you know Mr. Wilkinson?
A Yes, I do.
Q How long have you known him?
A Oh, since—I'll have to refresh my memory. As I recall, probably '63 or '64.
Q How long have you been in contact with him where you saw, oh, rather regularly since that time?
A Well, in the early period of my acquaintance with him, I saw his constantly, but in the past year I haven't seen very much of him.
Q When you say in the past year, is there any particular month that you can pick out when you stopped seeing Mr. Wilkinson regularly?
A Not actually, no.
[fol. 538] Q Well, approximately, would it be in August, September, October, November, December of last year, somewhere in that time period?
A I'd say approximately last summer.
Q Up to that time, had you seen him as a regular member of your church?
A Well, I couldn't say as a regular member, but I could say as a member.
Q How often would you see him that you can remember prior to this particular time period?

A Well, last summer, at the time I saw him he came by the place that I operate as a rooming rouse, and at that time I had not been seeing him for probably three months.

Q Did you talk to him about where he had been?

A Oh, yes.

Q He told you he had gone back to Mississippi, I believe, to see his mother; is that right?

A I think he did, yes.

Q Other than that three-month time period, you saw him on somewhat of a regular appearance as a member of your church; it that right?

A Before that period, yes.

Q Were you familiar with his reputation in the community up to that time as far as what kind of a person he was?

A Well, up until that time.

[fol. 539] Q And what was his reputation up to that time?

A Well, it was, I'd say, good.

[fol. 540] Q You had never heard anything bad about him; is that correct?

A No.

Q Did he ever help you when you needed help as far as your church going affairs?

A Well, he was active normally. I can't say that I was completely happy with his actions but—

Q In what way?

A As I say, a normal church member.

Q Just like most of the other people?

A Right. Right.

Q Not as good as the best but not as bad as the worst?

A Well, yes.

Q Now, with reference to when all of a sudden he sort of dropped out of the picture, you cannot fix the date other than sometime during last summer; is that right?

A No, because that is the time I remember he brought a woman by the place and he had two little children who were the children of some young woman.

Q That is the time when there started to be a change in him; is that right?
A Right.
Q And do you see that young woman in court here?
A I think I saw her one day.
[fol. 541] Q Out in the hall?
A Out in the—no, in the audience.
Q From that point on there seemed to be—You didn't see him any more since; is that right?
A Well, I think I saw him once or twice after that and the meeting was not too pleasant because I warned him of certain things.
Q Running with bad company?
A Right.
Q Now, did you go visit Mr. Wilkinson up in the County Jail?
A Yes, I did.
Q And did you talk with him about the fact that he was involved in a robbery where a human being was killed?
A Yes, I did.
Q And did he tell you that he was involved in this?
A Yes, he did.
Q And did he tell you what his feelings were about how he felt about what happened?
A Yes, he expressed himself.
Q What did he say?
A Well, he said that he was rather horrified and that he didn't—he felt that he was a goner.
Q A what?
[fol. 542] A A goner, that is the term I think he used.
Q Did he appear to be a braggard about what had happened?
A No, he asked that I pray for him.
MR. BORNSTEIN: Thank you, I have no more questions.
THE COURT: Miss Obera.
MISS OBERA: I have no questions.
THE COURT: Mr. Lloyd, do you have any questions of this witness?

MR. LLOYD: No, your Honor, I have no questions of Reverend Davis.

THE COURT: Reverend, you may step down. You may be excused from further attendance. You are welcome to remain here if you care to.

Call your next witness.

MR. BORNSTEIN: May I have just one second, your Honor.

THE COURT: Yes.

MR. BORNSTEIN: I'd like to call Sergeant Sullivan.

THE CLERK: Would you be sworn, please, by reading the oath aloud as you see it there before you.

THE WITNESS: I do solemnly swear the testimony I shall give in the cause now pending before this Court shall be the truth, the whole truth and nothing but the truth, so help me God.

THE CLERK: Be seated, sir.

[fol. 543] State your full name, please.

THE WITNESS: Richard L. Sullivan, S-u-l-l-i-v-a-n.

RICHARD L. SULLIVAN,

called as a witness by and on behalf of the defendant Wilkinson, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q Sergeant Sullivan, you were one of the investigating officers along with Sergeant Stevens; is that correct?

A I was, sir.

Q And I believe it was March 2 you went to Bakersfield?

A That is correct.

Q And in Bakersfield you went to the jail and you interviewed Mr. Wilkinson; is that correct?

A That's correct.

Q And at the jail in interviewing Mr. Wilkinson, did he have a conversation with you?

A He did, sir.

Q Now, part of the conversation has been referred to from a transcript that has been read from.

Does this appear to be absolutely correct in every [fol. 544] detail?

A No, it is not.

Q Are there some obvious differences that you can think of now as far as the transcription?

A Yes, there are, one in particular.

Q What is that?

A That strikes me. In the testimony relating to a stack of beer and a six pack of beer.

Mr. Wilkinson's reply was a six pack of beer.

Q What about the 22 statement that "I went to jail for it?" Do you remember that?

A That was Iola.

Q And are there any other errors that you can think of that have been brought to your attention while you have been sitting here?

A Not so much that have been brought to my attention. In reading the transcript of the tape recording I can see errors there that were not brought out in the testimony and words that are not in the right place, just from my own recollection. I wouldn't say that that transcript is entirely an accurate recording of the conversation.

Q And with reference to the conversation about the guns, do you remember what was said about the guns?

A You'd have to ask me a specific question with reference to the guns.

[fol. 545] THE COURT: Let me see counsel at the bench here for a minute, please.

(Conference at the bench was not reported.)

Q BY MR. BORNSTEIN: Now, prior to taking any statement from William Rodney Wilkerson, did you have a conversation with him and advise him of certain constitutional rights that he had?

A We did, sir.

Q And did you advise him by stating,

"Q All right. Now, we are going to start with the robbery, and before we do, we want to tell you of

your constitutional rights. First, you have a right to remain silent."

And Mr. Wilkinson answered, "Yes."

Was this a question and answer that took place?

A It was.

Q And then he was asked:

"And anything that you say or do in front of us can and will be used against you in court."

And the answer was. "Yes."

Was this question and that answer given by Mr. Wilkinson?

[fol. 546] A Yes, sir.

Q And, "Do you understand that you have the right to have an attorney of your own choosing, or if you don't have any money, you have a right to have one appointed free for you, to sit with you at all stages of the dictation."

And the answer was, "Yes."

Was that question asked and did Mr. Wilkinson give that answer?

A That is the question that was asked, but there is an error in the transcription. If I may have what you are reading I can read you exactly how it was asked.

Q Would you, please.

A The question was asked, "Do you understand that you have a right to have an attorney of your own choosing, or if you don't have any money, you have a right to have one appointed free for you, to sit with you at all stages of the proceedings."

The inaccuracy on the transcript is that "at all stages of the dictation." The word is "proceedings."

Q You have heard the tape since it has been run; is that correct?

A It has been some time, but I have.

Q In fact, we have listened to it together one day [fol. 547] I believe?

A Yes, that is correct.

Q And you remember distinctly that the statement was, "all stages of the proceedings."

A Proceedings.

Q Now, did Mr. Wilkinson cooperate with you in the investigation of these two robberies and the murder?

A He answered our questions.

[fol. 548] Q And based upon the answers, did you check out the answers that he had given to see if there were any inaccuracies or any mistakes or errors?

A The question is too broad, counsel.

Q Let me ask you this: In the conversation that was had with Mr. Wilkerson he described a person that was in the store; is that correct?

A That's correct.

Q And the description that he gave to you about the person, it is included in the tape; is that correct?

A That is correct.

Q And do you remember how he described this person that was in the store?

A He described him as being an elderly gentleman, as I recall, over 60, with a six-pack of Coors.

Q All right. Now, have you made a search to try to find or locate this witness?

A We have.

Q And I understand that you went into it with great detail; is that correct?

A That is correct.

Q He has not been able to be located?

A We have never been able to locate him.

Q Now, Mr. Wilkinson testified with reference to another person that said something about being the one [fol. 549] that lived next door.

Do you know who he was referring to?

A Yes, I do.

Q Who was that?

A That was a Mr. Butler, I believe.

Q Mr. Butler, you determined from your investigation, was not present at the time that the robbery and shooting took place; isn't that right?

A He wasn't.

Q He was there earlier?

A That is correct.

Q But you did determine that he was in the store when there were two persons that had been to the store earlier before the shooting; is that right?

A That is correct.

Q Did he tell you how much time had elapsed from the first time that the persons were in there until the shooting, if he knew?

A He did not.

MISS OBERA: Objection, calling for hearsay.

THE COURT: That objection is overruled. I will permit the answer to stand.

THE WITNESS: If I may finish my answer.

THE COURT: Will you read the question?

(The question was read by the reporter.)

THE WITNESS: He did not tell me, is my answer. [fol. 550] Q I will show you page 11 of the transcript and ask you to look at this question and this answer that I have just pointed out.

Do you recognize the question and the answer?

A Yes, sir.

Q Does this appear to be an accurate transcription, as you can remember it?

A Sir, at this time I would have to say that I can't state at this time whether that is an accurate transcript or not. I would have to listen to the tape, or, if I could refresh my recollection from my own notes there on the table that I made.

Q Would you please refresh your memory and then I will—

(Witness examines notes.)

THE WITNESS: I can't find it here. Before I could answer that question accurately, I would have to listen to the tape.

Q BY MR. BORNSTEIN: The section that we are referring to is the question and answer with reference to getting rid of the gun and something about the pin being broken, the fact that the pin was broken; is that correct?

A Yes, sir.

Q Do you have an independent recollection, if you can remember, what was said about the guns?

A I do.

[fol. 551] Q Would you tell us what you remember the conversation to be?

A As I remember the conversation, Mr. Wilkinson was referring to the fact that Dennis' gun was the .38 and that it had been broken, that the pin was broken. That he was—that when I say "he" I am referring to Dennis, that Dennis was attempting to find someone to repair the gun. That the malfunction with his gun, meaning Mr. Wilkinson's gun, had something to do with the fact that it didn't have a clip at one time, and that is my recollection.

MR. BORNSTEIN: Thank you, I have no more questions.

THE COURT: Mr. Lloyd?

MR. LLOYD: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. LLOYD:

Q In other words, Sergeant Sullivan, Mr. Wilkinson was talking about the condition of the pin of Mr. McGautha's gun; is that correct?

A That is my recollection.

MR. LLOYD: All right, I have nothing further, your Honor.

Miss Obera, do you have any questions of this witness?

[fol. 552] CROSS-EXAMINATION

BY MISS OBERA:

Q Who was present when the tape was played? You indicated Mr. Bornstein and you heard the tape. Was anybody else present?

A Mr. Bornstein was present. Mr. Cochran was present. Mr. Lloyd was present and, I believe, Mr. Mayerson was present and Sergeant Stevens.

Q You were actually present at the time of the conversation; is that right?

A That is correct.

Q And the conversation was recorded in your presence?

A That is correct.

Q And how was it recorded?

A It was recorded by a tape recorder that was secreted inside of an attache case.

Q It wasn't out in the open?

A No.

Q Was it a big tape recorder or small tape recorder?

A The tape recorder itself is probably 10 by 4 inches and then it is set inside of a briefcase, an attache case.

Q In listening to the tape recording, was it difficult for you to understand portions of it?

[fol. 553] A No, not for me, because I was present during the initial interview. I can well understand how it may be difficult, or it may be difficult for someone else to pick out certain portions of it because of the noise that was in the background and the conversation in adjacent rooms, and so forth.

Q Did Mr. Lloyd or Mr. Bornstein express any difficulty in hearing portions of the tape and understanding portions?

A Not to me.

Q Were portions of the tape replayed as you listened to it, that is, the three of you listened to it?

A The entire tape was played.

Q I understand that, but were portions replayed, or did you just go through it once?

A I don't recall that. There were times where either Mr. Lloyd or Mr. Bornstein or Mr. Cochran wanted to listen to one portion of the conversation once again and then make notes of whatever was said, but I think that was—that happened a few times.

MISS OBERA: I have no further questions.

[fol. 554] THE COURT: Mr. Lloyd.

MR. LLOYD: No, your Honor, nothing further.

MR. BORNSTEIN: No questions.

THE COURT: Sergeant, you may step down. Thank you.

MR. BORNSTEIN: Defendant Wilkinson rests, your Honor. Thank you.

THE COURT: Let's take our afternoon recess at this time.

Ladies and gentlemen of the jury, please bear in mind once again the admonition that I have given to you on many occasions. It is still in full force and effect.

It is, once again, that you are not to suffer yourselves to be addressed by any person on any subject matter of this trial, either directly or indirectly. You are not to converse among yourselves about this trial. You are not to form or express any opinion until this matter has finally been submitted to you.

We will be in recess now for 15 minutes.

(Afternoon recess.)

THE COURT: In the case of People versus McGautha and Wilkinson, the record will reflect the appearance of both defendants and the presence of all counsel and the jurors in their respective seats in the jury box.

MR. BORNSTEIN: Your Honor, I discovered that there was one more party that I wanted to call as a wit-
[fol. 555] ness. I didn't know he was here. May I reopen for that purpose?

THE COURT: Yes.

MR. BORNSTEIN: Mr. Bolling.

THE CLERK: Would you raise your right hand and be sworn, sir, by reading the oath aloud as you see it there before you.

THE WITNESS: I do solemnly—solemnly swear the testimony I shall give in the cause now pending before this Court shall be the truth, the whole truth and nothing but the truth, so help me God.

THE CLERK: Be seated. Would you state your full name, please.

THE WITNESS: Laban David Bolling, Jr.

THE CLERK: Spell both names.

THE WITNESS: L-a-b-a-n, David, and B-o-l-l-i-n-g.

THE CLERK: Thank you.

LABAN DAVID BOLLING,

called as a witness by and on behalf of the defendant Wilkinson, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q Mr. Bolling, may I ask what your business or occupation is?

[fol. 556] A I work for Nick Harris Detectives as a Security Guard.

Q Have you known William Rodney Wilkinson?

A Yes, sir.

Q How long have you known him?

A I don't remember exactly how long I've known him, but I know that we were baptized the same day in Reverend Davis' church, and I have known him about a week prior to that. About a week prior to that, I moved into Reverend Davis' rooming house, and Rodney at that time was living there.

Q Did you become friendly with Mr. Wilkinson?

A Very friendly. We were like brothers. We used to be together all the time.

Q Did you work together with him at different kinds of things?

A Yes. In fact—

Q Describe some of the things that he did and some of the things that you did as far as working and what kind of work he did and where you used to see him and how you used to see him?

A Well, I know that he worked for J. W. Robinson most of the time. When I left—I went to San Francisco for a while, and I came back occasionally, and he was working for J. W. Robinson. When I came back to live here permanently, I got—at first I worked for Bekins [fol. 557] Moving & Storage, and subsequently I got my own truck which was a 3-ton truck, and Rodney and I went together as business partners and we worked together.

Q What were you doing, what kind of work?

A Salvaging corrugated paper, tin, iron, copper, whatever we could salvage, buy and resell, stuff like that.

Q During this time period, you were very close to Mr. Wilkinson; is that right?

A Very close.

Q You had a chance to observe the kind of person he was; is that right?

A Yes.

Q You saw people that he knew and that you knew in the community; is that right?

A Yes.

Q What was his reputation in the community for being an upright citizen during the time that you saw him?

A Well, for as long as I have known Rodney, I have never known him to be in any trouble, serious trouble. We would go out and drink together, and went on dates together, and so forth, and so on, and we never had any trouble.

Q What was his reputation in the community then during this time as far as being a violent person or an [fol. 558] agressive person?

A He wasn't violent and he wasn't aggressive.

[fol. 559] Q What about his reputation for being an honest person?

A He was—he had a good reputation.

Q All right. Was there some change in his character that you observed at some time?

A Yes, while we were in business together.

Q When was this?

A Well, it was last year, I would say, maybe November, around November, or maybe even before then, October, November.

Q All right. What did you observe about Mr. Wilkinson that changed?

A Well, we—at this time we were working on the truck together, and he became irresponsible, and he started running around with people I didn't know. He didn't introduce me to them, and the few that I saw, I

didn't particularly approve of because, as far as I was concerned, they were thugs, and—

Q Did he start running around with another girl or woman at this time?

A Yes.

Q Do you know what her name was?

A No, I don't.

Q Can you describe her?

A Well, she was a young woman.

Q Anything else about her?

[fol. 560] A Brown skin, long hair. I only met her on one occasion.

Q Did she have any children?

A Yes.

Q How many?

A Two.

Q Is this about the time that you observed a change in Mr. Wilkinson's character?

A Yes.

Q From this time on, did you have much to do with him?

A No. We had one telephone conversation after that, and he called me—he saw my girl friend and he had a conversation, and he called over to her house seeking me, and I talked to him, and he told me he needed some money, that the girl's children didn't have any milk, so I told him that I didn't have much money, but that I would buy some milk and bring it by. At this time he said, well, maybe he could get something else, so I never did go by and I never did see him.

Q But up until the time that he met this girl with the two small children, he had been a good citizen in the community; is that right?

A Yes, sir.

MR. BORNSTEIN: Thank you. I have no more questions.

THE COURT: Miss Obera, do you have any questions?

[fol. 561] MISS OBERA: No questions.

THE COURT: Mr. Lloyd?

MR. LLOYD: No, your Honor.

THE COURT: You may step down. You are welcome to remain here, but you are under no obligation to do so at this point.

MR. BORNSTEIN: Defendant Wilkinson rests at this time.

THE COURT: Mr. Lloyd?

MR. LLOYD: Thank you kindly, your Honor.

Mr. McGautha.

THE CLERK: Would you raise your right hand and be sworn, sir, by reading the oath aloud as you see it there before you.

THE WITNESS: I do solemnly swear the testimony I shall give in the cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help me God.

THE CLERK: Be seated, sir.

Will you state your full name, please.

THE WITNESS: Dennis Councle McGautha.

THE CLERK: Spell the last name, sir.

THE WITNESS: Yes. It is M-c-G-a-u-t-h-a.

[fol. 562] DENNIS COUNCLE McGAUTHA,

called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LLOYD:

Q Mr. McGautha, did you shoot Mr. Benjamin Smetana?

A No, I did not.

Q What is your birth date, please, sir?

A February the 2nd, 1926.

[fol. 563] Q And, how old are you, please?

A 41 years old.

Q Mr. McGautha, do you have a bad arrest record?

A Yes, I do, sir.

Q But did you kill Mr. Smetana?

A No, I did not, sir.

Q Did you strike Mrs. Smetana on the head with a gun?

A No, I did not, sir.

Q Were you present when Mrs. Smetana was struck on the head?

A Yes, I was, sir.

Q Who struck her on the head?

A Rodney Wilkinson.

Q And what, if anything, did he strike her on the head with?

A To my knowledge, it was a gun.

Q And do you see the gun present in court that he struck her with?

A Yes, I do, sir.

Q And does this appear to be the gun, indicating People's 3 in evidence, your Honor.

A Yes, it is, sir.

Q Now, was this your gun?

A It was not my gun, it was in my custody.

[fol. 564] Q And had you had this gun in your custody, as you put it, for a long period of time?

A No, I had not, sir.

Q Did you use this gun in a robbery on February 14, 1967?

A Yes, I did, sir.

Q And was this a market on Wall Street in the City of Los Angeles?

A I believe it was on Wall, 3700 block, or something like that, sir.

Q Were you present when Mr. Smetana was shot?

A Yes, I was, sir.

Q Who shot him?

A Rodney Wilkinson.

Q Would you take your time, please, sir, and tell the Court and jury what you were doing at the time Mr. Wilkinson struck Mrs. Smetana on the head and shot Mr. Smetana?

A Well, at the time that the incident occurred, I was on my way to the box on the left-hand side of the store. I believe it would be to the west side of the store. I encountered a customer and as I approached the customer

he had something in his hand. To me it looked as though it was beer. And at this time there was a noise, a commotion, and he started to approach to his left, which would be going in the direction east.

[fol. 565] Q He who, the customer?

A The customer.

Q All right, go ahead.

A And this is when I grabbed him and him being a large man, I had to grab him with both hands.

Q Now, at the time when you grabbed the customer, did you have a gun in your hand?

A No, I did not, sir.

Q Did you have a gun on your person?

A Yes, I did, sir.

Q Tell the Court and jury what kind of gun you had on your person at the time you were in the market on Venice Boulevard?

A It was a .32 automatic.

Q Now, at the time at the earlier robbery, who, if anyone, had that .32 automatic?

A Wilkinson had it at the earlier robbery.

Q Was there some conversation between yourself and Mr. Wilkinson after you robbed that store on Wall Street and before you went to the market on Venice Boulevard?

A Yes, there was.

Q Would you please tell the Court and jury what was said?

A Well, there was more money needed and that he was afraid of the .32 automatic.

[fol. 566] Q Mr. Wilkinson told you he was afraid of the .32 automatic?

A Yes, he said that he was afraid of the .32 automatic because it would only hold one shell in the chamber and then if he was ever in trouble he would like to have more of a defense, and so at this time we traded guns.

Q You gave him your gun?

A Yes, I did, sir.

Q Mr. McGautha, were you ever in the military service?

A Yes, I was.

Q And when were you in the military service?
A September 5, 1942.
Q And on September 5, 1942, how old were you?
A 16 years old.
Q Were you injured in combat?
A Yes, I was, sir.
Q Would you tell us about that injury?
A A 50 millimeter machine gun fell on my right foot and fractured a bone in it.
Q What type of discharge, if any, did you receive?
A Honorable discharge.
Q Now, the first time, Mr. McGautha, that you were convicted, was that back in 1943 of a crime?
[fol. 567] A Yes, it was.
Q And what was that crime, please, sir?
A Robbery.
Q How old were you then?
A 17 years old.
Q And what state was that in?
A Dallas, Texas.
Q When were you released from that robbery charge?
A I was convicted in 1943, released in 1946.
Q And what did you do after you were released in 1946?
A I started to working at a produce company in Houston, Texas.
Q And how long did you work there, sir?
A Up until 1948.
Q And then what happened?
A I was involved in a fight with another man.
Q And was that man killed?
A He died later after the fight.
Q All right, and did you go to court for that?
A Yes, I did, sir.
Q And what happened, please, sir?
A I was convicted of manslaughter.
Q Now, in Texas do they call it murder without malice?
[fol. 568] A Yes, they do, sir.
Q And how long—Did you serve time for that?
A Yes, sir.

Q And how long were you in jail for that?
A Fourteen months.
Q How long?
A Fourteen months, a year and two months.
Q And then what happened, please, sir?
A I was released in 1949.
Q And then what happened?
A Well, after I was released, I went back to work.
Q Where did you go to work?
A Back at the produce company.
Q Pardon?
A Produce company.
Q The same produce company you had been working for?
A Yes, sir.
Q All right, continue, what happened after that?
A What happened after that, I became involved in, well, I guess you would say more or less like a bunch of neighborhood youngsters, and one particular night we were out riding and I dropped two of them off and the other one went with me. We went to a movie and after [fol. 569] that this one that was with me wanted to borrow the car. He said he was going to see a girl friend, and so—when I was still at the movie. And then they all three came back and picked me up and on the way home we were stopped for robbery.
Q All right, what happened then, sir?
A I was convicted of robbery.
Q And then what happened?
A I was sentenced to the penitentiary.
Q For how long?
A Ten years.
[fol. 570] Q And then what happened?
A I served six years up to 1958, and I was released.
Q Then what did you do from 1958 on?
A 1958, I came to California, and then I began to work again.
Q For whom did you work here, Mr. McGautha?
A Numerous people.
Q Would you name some of them for the Court and jury, please.

A Yes, sir. I'd like to try. I worked for Judge Alfred Gitelson of the Los Angeles Superior Court. I worked for D. J. Davison which is president of the Merchants Association. I worked for Foreign Ad Film Service which is an ex-partner of Governor Knight, ex-Governor Knight. I worked for actor Peter Lawford and Mrs. Lawford. I served ex-President John F. Kennedy, Robert Kennedy, Edward Kennedy, Ethel Kennedy, Sergeant Shriver, Mrs. Shriver. I was a theater manager in Los Angeles.

Q At what location were you a theater manager, sir?

A On Broadway.

Q What hundred block, please?

A Between Fifth and Sixth.

Q What was the name of the theater?

[fol. 571] A Roxy and RKO Theater.

Q Continue, Mr. McGautha, I am sorry.

A And after that I had a nervous breakdown which caused a coronary heart attack.

Q Do you have a heart condition at this time?

A I do, sir.

Q Mr. McGautha, did you have certain feelings about this death of Mr. Smetana at the market?

A I certainly do, sir.

Q What was that feeling?

A I regretted that it happened.

Q Mr. McGautha, is your mother living?

A No, she isn't, sir. She is deceased.

Q Do you have any brothers or sisters?

A Yes, I do, sir.

Q How many?

A I have a brother, a half brother, and a half sister.

Q Your mother and father living together while you were growing up?

A No, they did not, sir.

Q How old were you when they separated?

A To the best of my knowledge, I was four years old.

Q Where were you born?

A I was born in New Orleans, Louisiana. I was [fol. 572] raised in Houston, Texas.

Q Did you at any time, Mr. McGautha, tell anyone that you shot Mr. Smetana?

A No, I did not, sir.

MR. LLOYD: I have no further questions, your Honor.

THE COURT: Miss Obera.

CROSS-EXAMINATION

BY MISS OBERA:

Q Mr. McGautha, do you recall the witness Erma Gean Dupree?

A Yes, I do.

Q Do you recall her statement about what was said concerning a shell from a gun?

A Yes, I do.

Q She indicated that you said to Mrs. Smith, "If you don't believe I shot the gun, smell it."

Do you recall that?

A Yes, I recall that.

Q Was such a statement made by anyone in your presence?

A No. No, there was no statement of that sort made.

Q Now, let's go to February 14, 1967, the date Mr. Smetana was shot. Now, after the shooting, in leaving [fol. 573] the store, did you have anything in your hands?

A Yes, I did.

Q What did you have?

A I had a bottle of wine.

Q Where did you get the bottle of wine?

A The bottle of wine was bought at the counter—not after the shooting. It was bought before the shooting.

Q Who bought it?

A I bought the wine.

Q Tell us, if you will, everything that happened from the time you and Mr. Wilkinson entered the store, everything that you remember.

A The store was entered twice, Miss Obera. The first time there was a bottle of wine bought and a six-pack of beer. The second time we were in the store, there wasn't anything bought.

Q Are you telling us now that you did not have a bottle of wine when you left the store the second time?

A No, I didn't have anything.

Q All right. Tell us, then, what happened the second time the store was entered.

A The second time we walked in the store and there was Mrs. Smith. She was buying bologna, and Mrs. Smetana was standing at the counter. Mr. Smetana was in the back cutting bologna, and there was a customer, I believe, coming from the west side of the store as if [fol. 574] to come around the aisle, and saw us coming in the store. We split, sort of in this direction. I went to the west side of the store and I encountered the customer.

Q What was your purpose in going to the west side of the store?

A To encounter the customer.

Q Was it your intent when you entered the store to commit a robbery?

A No.

Q Had there been a discussion about a robbery?

A Yes.

Q Had you considered that you might commit a robbery when you entered?

A Yes.

Q All right. Will you continue.

A Well, after we walked in the store, as I say, I went to the left of the store, which would be the west side, and I encountered the customer, and I held him, and after a while there was a commotion, and then there was a sound of a shot, you know, something went bam, and then we proceeded to start to run, but I guess by my being a little further in the back, I was the last one to leave the store.

Q Did you hear a lady scream while you were in the store?

A No.

[fol. 575] Q What did this commotion sound like that you heard?

A Like a bam.

Q Like the sound of a gun?

A Right.
Q Before the sound of the gun, was your attention directed over to the counter at all?
A Yes.
Q What directed your attention over to the counter?
A A matter of—what actually drawed my attention was that there was a gun drawed on the lady.
Q Did you see that?
A Yes, I did.
Q Who had the gun drawn on the lady?
A Mr. Wilkinson.
Q Was Fannie Lue Smith in the store at that time? Was she in the market?
A No, I don't think she was. I believe she had left.
Q When you saw the gun drawn on Mrs. Smetana, could you see where Mrs. Smetana was?
A To be exact, I think Mr. Smetana was close to the register.
Q When you saw the gun drawn on Mrs. Smetana, what did you see next?
[fol. 576] A I saw something like a motion of a strike.
Q Did you hear a noise at the time of the striking?
A No.
Q Did anybody say anything?
A No.
Q Did you see Mrs. Smetana at that time?
A Yes. She started to run towards the back.
Q When you say towards the back, where do you mean, in what direction?
A That would probably be the north, north side.
Q Where would that be in relation to the door?
Let me ask you this: Was she behind the counter at the time?
A Yes, she was.
Q Did she remain behind the counter?
A Yes, she did.
Q When she started to run, in which direction did she run?
A Away from the door.
Q Did you see her fall back against some shelves at all?

A No, I did not.

Q Now, when you were observing this, what was the customer doing?

[fol. 577] A He was trying to get away from me.

Q Were you holding him?

A Yes, I was.

Q And still observing?

A Yes, I was.

Q Did you say anything?

A No, I didn't.

Q All this time, where was your gun?

A In my pocket.

Q When I say your gun, what gun did you have?

A The .32 automatic.

Q You did not have it in your waistband?

A No.

Q Did you know that gun was loaded?

A The .32 automatic?

Q Yes.

A No, I didn't know whether it was loaded or empty.

Q Well, was it your intention to use that gun in the robbery, if necessary?

A No.

Q Now, when Rodney told you that the automatic would only hold one shot and he'd like to have more bullets, didn't you know at that time that the automatic was loaded?

[fol. 578] A At the time when he spoke of it, yes, it was loaded.

Q Well, that was before you went into the market, wasn't it?

A Yes, it was.

Q Nobody unloaded it, did they?

A Not that I noticed.

Q Did you hear Rodney say anything to the woman?

A No, the only thing I say is I heard a commotion.

Q After the sound of the gun, what happened then?

A Well, I sort of shoved this gentleman I had a hold of. I shoved him away from me, and then I proceeded to run, and this time I ran in behind Mr. Wilkinson.

Q Where did you go?
A To the car.
Q Then what happened?
A Then we left and went back to the house.
Q What happened at the house?
A There was some money separated.
Q Where did the money come from?
A Mr. Wilkinson had it.
Q Where did he get it? if you know.
A To be exact, I couldn't say. I came in behind
[fol. 579] him.
Q Did you see any money in his hands as you were going to the car?
A No.
Q Did you see a gun in his hands as you were going to the car?
A No. He was in front of me.
[fol. 580] Q How long after you heard that shot did you leave the store?
A It was immediately after the shot.
Q Before you left, did Mr. Wilkinson say, "Let's go."
A To be exact, Miss Obera, I couldn't say.
Q Did you say "Let's go."
A No, I didn't say a word.
Q When you say, "We left immediately," can you give us an estimate of the time?
A I'd say somewhere in the neighborhood of two, three minutes, maybe.
Q Minutes?
A Something like that.
Q All right, now, what happened between the time you heard the shot and the time you left?
A Well, it was something like gathering up money and me holding the customer. He was constantly trying to get away from me and I was constantly trying to hold him, and he, Wilkinson proceeded to run, and I shoved him away and I ran behind him.
Q Who was gathering up money?
A Whether it was money or not, I couldn't say, I wasn't that close to him. It was a procedure of gathering up something in a newspaper.

MR. LLOYD: The question was, "Who was doing [fol. 581] that?" I'm sorry.

THE WITNESS: Mr. Wilkerson was at the counter gathering something up.

Q BY MISS OBERA: How far away were you from Mr. Wilkerson, Wilkinson at the time the shot was fired?

A To be exact, to say in feet, ma'am, I couldn't say.

Q Can you give us an estimate on the basis of anything in the courtroom?

A Yes, I would say somewhere between here and the second row of seats in the audience.

MISS OBERA: About 25 feet, counsel?

THE WITNESS: Approximately, something like that.

MR. BORNSTEIN: So stipulated.

MR. LLOYD: So stipulated.

Q BY MISS OBERA: Then when you got to the house there was a division of money?

A A division of money.

Q Did you contribute any money to this when the money was divided?

A No.

Q Did Mr. Wilkinson contribute any money?

A No.

Q Where did it come from?

A Mr. Wilkinson was dividing the money.

Q And how much money did you get?

[fol. 582] A To be exact, I think it was about twenty some dollars.

Q And then what happened?

A That was all.

Q Well, you didn't just stop living right then.

A No.

Q What happened? What did anybody do of that group?

A Well, then we proceeded to go to Watts.

Q All of you?

A No, just the two of us.

Q You and—

A Mr. Wilkerson.

Q And where was Erma Gean Dupree?

A She was left at the house.

Q Where was Fannie Lue Smith?
A She was left at the house.
Q And after you went to Watts, where did you go next?
A We came back to the house.
Q How long were you in Watts?
A Sometime after 7:00.
Q And then where did you go?
A Then we proceeded to leave the house after we got a phone call stating that the police were looking for us.
[fol. 583] Q When did you get this phone call?
A It was about 9:00, somewhere about 9:00.
Q Where were you then?
A I was at the house.
Q When you say "the house," you are talking about Fannie Lue Smith's house?
A Right.
Q Did you still have the .32 at that time?
A Yes, I did.
Q Did Mr. Wilkerson still have the .38 at that time?
A No, the .38 had been put up.
Q All right, now tell us about the circumstances of putting up the .38.
A Well, the gun was given back to me as we proceeded up the back steps of the apartment.
Q Excuse me, you are talking about Fannie Lue Smith's place?
A Right.
Q All right, continue.
A I—

(The reporter asked the witness to repeat his answer.)

THE WITNESS: I ejected, you know, when you break it down, it comes up.

I ejected the empty shell out and I threw it away.
[fol. 584] Q BY MISS OBERA: Was Erma Gean Dupree there at that time?
A No.
Q All right, continue.
A She was not present at all during the procedure.

Q Where was she?

A She was going around the front and coming through the front of the apartment.

Q All right, continue.

A Maybe I can clear it up for you, Miss Obera.

See, you can open the front door, you can't open the back door unless you come through the front, and the two babies and Fannie, and Erma Gean Dupree had proceeded to the front of the apartment and we went up the back steps of the apartment to come up through the back. Do you understand?

Q All right, now when you broke open this gun and you removed the shell did you just remove an empty shell?

A Yes, I did.

Q Were there other bullets in the gun?

A Yes, there were.

Q How many?

A Four.

Q And what did you do with the empty shell?

[fol. 585] A The empty shell, I threw it away.

Q Where was Wilkinson then?

A He was with me.

Q Now, when he gave you the .38 you still kept the .32?

A No, I gave it back to him as we got upstairs.

Q And when you got upstairs was anything done with respect to the .32?

A Yes, when we arrived in the living room, to the best of my recollection, I think it was broke down and the cartridge taken out.

Q When you say broke down, you mean pulled back, that thing on the top?

A Yes, sir.

Q And was Erma Gean there at that time?

A Yes.

Q And had you ever let anybody else use your .38?

A No. The gun doesn't really belong to me. It was left at my house through a debt.

Q It was a gun that you kept?

A Yes.

Q And had you ever let anybody else use it?
A No.
Q When the gun was returned to you did you notice anything unusual about it?
A No, I did not.
[fol. 586] Q Did you notice the firing pin was broken?
A No.
Q Did you at anytime notice the firing pin was broken?
A Yes, I did.
Q When did you first notice that?
A When I was in Bakersfield.
Q And did you have some conversation about a gunsmith at that time?
A Yes.
[fol. 587] Q Did you—who was present at that conversation?
A Watkins. I believe that is his name, John Watkins.
Q Was Mr. Wilkinson there?
A Yes, he was.
Q Had you made any complaints about the firing pin before the time you let Mr. Wilkinson use the .38?
A No.
Q And now, when was it that you got this .38?
A The gun was left at my house around about, oh, I'd say a week before Christmas. Mr. Clinton Givens left it there and I guess you would say that he owed eighty dollars worth of rent. He was living at my house at the time.
Q Well, did you have another .38 before that?
A Yes, in 1964 I owned a .38.
Q In 19 what?
A '64.
Q You owned a .38?
A Yes.
MR. LLOYD: Your Honor, may I ask the witness to keep his voice up, I can hardly hear him.
[fol. 588] THE COURT: Yes, and if you want any testimony reread, Mr. Lloyd, just ask me and we will have it reread.

MR. LLOYD: Thank you, your Honor.

Q BY MISS OBERA: Did it look like this gun in front of me, People's 3?

A Yes, it was somewhat to that effect.

Q Is that the gun you used to keep under your pillow?

A No, I never kept it under my pillow.

Q Did you ever have it in your waistband?

A No.

Q Did you ever demonstrate your ability to draw the gun from your waistband?

A No.

Q Do you know that Officer who testified against you?

A No, I don't.

Q Have you ever seen him before?

A It is possible I have seen him.

Q Now, let's talk for a moment about your record. Referring to the robbery in 1943, did you commit that robbery by yourself or with someone?

A No, I didn't commit the robbery at all.

Q You were convicted of it?

[fol. 589] A Yes, I was.

Q You pleaded guilty; didn't you?

A Yes, I did.

Q Now, referring to the conviction in 1948 of murder without malice, would you tell us about the circumstances?

A Yes. This man and I worked together. We were driving cabs at the time, taxicabs, and he was more or less known as something of a bully, and I had quit the job previous of that because of him. I had left a portable radio, a wristwatch and I had went back to pick it up, and upon my coming back to pick it up, this guy attacked me and so I had to fight him off and he was cut. Four days after he was cut he died from the lack of medication.

Q What was he cut with?

A A pocket knife.

Q Who cut him?

A I did.

Q Did you plead guilty to that?

A Yes, I did.

Q Now, directing your attention to 1949, a robbery conviction for which you did six years, can you tell us about that?

A I was not convicted of robbery in 1945, it was 1952.

Q All right. Tell us about that.

[fol. 590] A Yes, as I stated before, I think you asked me that question once before, Miss Obera, and I answered it.

Q You did a robbery—You committed a robbery for which you received six years; did you not?

A I received 10 years.

Q And you served six of them?

A I served six years.

Q Now, what were the circumstances surrounding that robbery?

A As I stated before, there were four of us involved, three of them were youngsters in the neighborhood.

We went out riding one night. Two of them got out, at least, I dropped two of them off. Two proceeded to a movie house. As we arrived at the movie house one stated that he wanted to go to his girl friend's. I loaned him the car. He was proceeding to go and pick the other two up. They committed a robbery. It was on the street by Garland and Leland, and then they returned to pick me up.

On the way to my house we was stopped by the police.

Q So you are telling us that you served all told over 10 years in jails and prisons for crimes you did not commit; is that a fair statement?

A Only two I didn't actually commit.

[fol. 591] Q You say you didn't commit any of the robberies?

A No, I did not. I was only an accomplice.

MR. LLOYD: You were only a what?

THE WITNESS: An accomplice.

MR. LLOYD: Just a minute. I'm sorry, your Honor.

May I ask the reporter to read the answer back, please, your Honor?

THE COURT: Yes, would you read the answer?

(The answer was read by the Reporter.)

Q BY MISS OBERA: Now, in 1952 you had a robbery by assault conviction; is that right?

A That is the one you just asked me about, Miss Obera.

Q Well, let me just review this.

You had one in '43, and one in '52; is that it?

A Yes, ma'am.

Q Now, when you did all this work for the Kennedys, and that group, what kind of work were you doing?

A Chauffeur man, man servant, personal valet.

Q Where were you doing all that work?

A At a private home. Also, I left one out, Max Factor's of Hollywood.

Q When you were picked up you were aware, and I [fol. 592] am talking about on this last charge, you were aware, were you not, that your gun had been used to kill Mr. Smetana?

A Yes, I was.

Q And did you tell anybody who fired the gun?

A Yes, I think I did, Miss Obera.

Q Who did you tell that to?

A I think it was Eddie Rupert.

Q What did you tell Eddie Rupert?

A I told Mr. Rupert that Mr. Wilkinson had shot a man, a white man.

Q Did you say it was Wilkinson's life or the man's life and he chose his?

A I believe I did.

Q Did you have any basis for that statement?

A Yes, it more or less was to try to get him to be accepted. I was known by Mr. Rupert, Mr. Watkins, and the other people in Bakersfield, and Mr. Wilkinson wasn't. [fol. 593] Q You didn't see Mr. Smetana with any weapon, though, did you?

A No, I did not.

Q So when you said it was the man's life or his life, you just made that part up?

A Yes, I did.

Q In fact, you knew that Mr. Wilkinson had shot Mr. Smetana in cold blood, didn't you?

A Well, I wouldn't know the meaning of cold blood, Miss Obera.

MISS OBERA: I have no further questions.

THE COURT: Mr. Bornstein.

CROSS-EXAMINATION

BY MR. BORNSTEIN:

Q Mr. McGautha, you say it is not your practice to carry a gun; right?

A No, it isn't.

Q What about September 9, 1964, in Huntington Beach? Was it your practice to have a gun on you at that time?

A No, I did not have a gun on me, sir.

Q Did you have a gun in the car that you were in?

A There was a gun in the car, sir.

Q What kind of a gun was that?

[fol. 594] A To the best of recollection, it was a .38.

Q Who else was in the car besides you?

A There were three other men in the car outside of me.

Q Were you convicted or did you plead guilty of carrying a concealed weapon?

A I pleaded guilty to carrying a concealed weapon.

Q That was September 11, 1964; right?

A I believe it was.

Q Now, with reference to this officer that testified, it is your testimony you never saw this man before you saw him here in court today?

MR. LLOYD: No, your Honor, that's not—

THE COURT: Excuse me. Is there an objection now?

MR. LLOYD: Yes, your Honor; misstating the evidence. He didn't say he hadn't seen the officer before.

THE COURT: The objection will be overruled. This is further cross-examination of this witness.

Would you read the question, please.

MR. BORNSTEIN: Thank you, your Honor.

(Question read.)

THE WITNESS: To the best of my recollection, no, I have never seen him before.

Q BY MR. BORNSTEIN: Now, you know a fellow by the name of Guy Jones; right?

[fol. 595] A Yes, I do, sir.

Q How long have you known Guy Jones?

A Since 1964.

Q This officer said he met you through Guy Jones. Now, does that refresh your recollection in any way?

A It is possible. Guy Jones is a musician. We were in night clubs during that time. It is possible I could have met him.

Q This officer said that he spent much time with you over this time period. Do you remember that?

A No, I don't, sir.

Q Do you know why he would come in here and testify he saw you sleeping with a gun like this under your pillow?

A No, I don't, sir.

Q Do you know why he would come in here and testify he saw you carry a gun like this in a glove compartment of a car?

A He's never seen me in a car with a gun in the glove compartment.

Q Where has he seen you carrying it, sir?

A He hasn't seen me carrying it at all, sir.

Q Would you know why he would come in and say that under oath?

A No, I don't.

[fol. 596] Q Would you know why he would come in and say he observed you practicing quick drawing a gun like this?

A No.

Q For no apparent reason, he just comes in and says, as far as you know, sir?

A As far as I know, sir.

Q You said at the store that the first time you went in the store is when the beer and the wine had been purchased; is that correct?

A That's correct.
Q The second time you had nothing in your hands when you left the store; is that correct?
A That's correct, sir.
Q You are saying that Mrs. Smetana was correct in her testimony about what took place; is that right?
A To the best of my knowledge, right.
Q You heard her testify about the fact that the second time when she was there she saw the person that was closest to the counter, that he is the one that bought the wine and he is the one that his her on the head? Do you remember her saying that?
A To the best of my knowledge, I think I do, sir.
Q All right. Now, does that refresh your memory when the wine was taken out of the store?
A The wine was purchased in the beginning in the [fol. 597] first time of arriving in the store.
Q All right. Now, you were the one that had this .38 at Pon Lock's market?
A Yes, I do.
Q You were the one who was wearing the sweater that day; is that right?
A No, sir, I was not.
Q What were you wearing?
A I was wearing a jacket.
Q What color was the jacket?
A Green striped jacket.
Q It wasn't beige or brown or yellow, was it?
A No, sir.
Q But Mr. Wilkinson was wearing a sweater or a shirt with long sleeves that was almost beige with a yellow tinge; isn't that true?
A No, sir. He was wearing a short-sleeved shirt.
Q What collor was it?
A And a beige jacket.
Q He was the one that had the beige jacket on; isn't that true?
A Right.
Q Now, when the police questioned you, and they did question you, did they not, up in Bakersfield?
A Something to that effect, sir.

[fol. 598] Q They advised you of your constitutional rights, did they not?

A I believe they did, sir.

Q And they told you in effect that—they introduced themselves, "My name is Stevens. My partner's name is Sullivan. We are from the Los Angeles Police Department and we are going to handle this case. We are going to be talking to you about some robberies and a murder, and before we want to tell you—before we do, we want to tell you about your constitutional rights. You have a right to remain silent. You understand that?"

Was that question asked of you?

A I believe so.

Q Did you tell him that you understood this?

A To the best of my knowledge, I think that's right.

Q Did you tell them that anything you say or do in front of us can be used in court against you, and did you answer, "Yes, I understand this"?

A Right, sir.

[fol. 599] Q Did they tell you that you had a right to have an attorney of your own choosing, and if you don't have money available you can have one appointed free, and he can be with you sitting here with you during all stages of your case? Do you understand that?

A That's true.

Q And you said, "Yes," you understood; is that right?

A Right.

Q And then they asked you about a robbery of a market at 38th and Wall Street; correct?

A Right.

Q You are now admitting here that you participated in that robbery; correct?

A I did.

Q Why did you tell the police you had nothing to do with it?

A Normally, anyone would have done that, sir.

Q Why did you tell the police you never had a gun?

A Normally, anyone would have did that, sir.

Q You knew that you had just been convicted a short time prior to this for being—having a gun in your possession; isn't that right?

A Approximately three years, maybe four years back.

[fol. 600] Q That's in '64?
A Right.
Q They asked you, "Did you ever have a 1938 revolver"—
THE COURT: You misspoke yourself.
Q BY MR. BORNSTEIN: I am sorry.
—"a .38 caliber revolver", and you said, "No"; is that correct?
A Yes.
Q Why did you say that?
A They were planning the case and the charge was being lodged against me, to the best of my recollection.
Q All right. But you knew all along that you didn't do the shooting, right?
A Right.
Q From what you testified here today, you had no prearranged plan when you went into that market on Venice Boulevard to hold it up; isn't that right?
A Yes, that was a prearranged plan.
Q Well, you told us—
A It had been discussed.
Q Now, you told us a few minutes ago you didn't have any prearranged plan.
MR. LLOYD: Your Honor, that's a misstatement of the testimony.
[fol. 601] THE COURT: Wait a minute. The objection will be sustained on the grounds that that question was argumentative.
MR. BORNSTEIN: All right.
Q Did you answer a question prior to this when you testified on direct examination that you hadn't discussed anything about robbing that store? Yes or no.
A No, I didn't.
Q All right. Had you had a discussion in the car about robbing a store?
A We had had discussions about robbing.
Q What about this store?
A Not about any particular store.
Q All right. When you went in that store, there was nothing on your mind about holding it up; is that right?

A Yes. We walked in. After we had purchased the wine, we decided to return and rob the store.

Q Who decided?

A Wilkinson and I.

Q Then you went back; right?

A Right.

Q Did you know whether or not that storekeeper had a gun in that store when you went back the second time?

A To the best of my knowledge, no, sir.

Q You didn't know whether he—

[fol. 602] THE COURT: Excuse me, Mr. Bornstein. The hour is now 4:30. Would this be a convenient place to curtail your cross-examination this evening?

MR. BORNSTEIN: Be fine, your Honor. I have no objections.

THE COURT: All right. You may step down, Mr. McGautha.

Ladies and gentlemen of the Jury, we are going to recess this matter now until tomorrow. Once again I call to your attention your obligation to heed the admonition that I have given to you now time and time again. It is still of the utmost importance to be followed and adhered closely to by the jury.

It is, once again, that you are not to talk to anybody about this case, and you are not to let anyone talk to you about it, either directly or indirectly. You are once again admonished that you are not to talk about this case among yourselves at this point, and you are certainly not to form or express any opinion on this matter until it has finally been submitted to you.

We are in good shape for tomorrow. We only have four trials, for some reason, set in this department tomorrow, and three other matters, so we should be able to commence this matter at 10:00 o'clock tomorrow morning. Have a nice evening. I will see you back here at 10:00 o'clock tomorrow morning.

(An adjournment was taken until 10:00 a.m.)

[fol. 603] LOS ANGELES, CALIFORNIA,
THURSDAY, AUGUST 24, 1967; 10:03 A.M.

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THE COURT: In this case of People versus McGautha and Wilkinson, the record will reflect the appearance of both defendants, the presence of all counsel, and the jury in their respective places in the jury box.

Good morning, ladies and gentlemen.

At our recess yesterday, Mr. McGautha, you were on the witness stand. Would you please resume the witness stand. Keep in mind that you have previously been sworn and you are still under oath, Mr. McGautha.

Mr. Bornstein, I believe that you were in the process of your cross-examination of this witness and you may continue.

MR. BORNSTEIN: Thank you, your Honor.

DENNIS COUNCLE McGAUTHA,

a defendant herein, called as a witness in his own behalf, having bee previously duly sworn, resumed the stand and testified further as follows:

CROSS-EXAMINATION (Continued)

BY MR. BORNSTEIN:

Q Now, Mr. McGautha, what did you say you were wearing when you were in the store on Venice Boulevard [fol. 604] on the 14th of February, 1967?

A Sort of a green striped jacket.

Q It was very plain green? I mean, it wasn't a green where there were a lot of colors into it? It was green; right?

A No. It was green with stripes in it.

Q What color stripes?

A Green stripes.

Q Two shades of green; right?

A Gray.

Q Gray?
A Several colors in it.
Q There was no brown or beige in it, was there?
A No.
[fol. 605] Q Now, the first time that you went into the store on Venice Boulevard that was the time that you stated wine and beer was purchased; is that correct?
A That's right.
Q Now, after you left the store the first time you went riding around in the car with Fannie and Erma, Mr. Wilkinson, and the two children; is that correct?
A No.
Q Where did you go after you came out?
A No place.
Q Just sat there and waited?
A Yes, sir.
Q How long did you wait?
A To be exact, I couldn't say, sir. I'd say somewhere in the neighborhood of maybe 25, 30 minutes.
Q And that was for what purpose?
A To go back into the store.
Q And hold it up?
A Right.
Q You were waiting for the people that had been in the store earlier to leave?
A Right, sir.
Q Now, the first time that you were in the store how many people, or persons did you see in the store?
A I couldn't say, sir. It was quite a few.
[fol. 606] Q And did you see Mrs. Smetana in the store the first time?
A Yes, sir.
Q And where was she when you first saw her?
A Behind the counter.
Q With Mr. Smetana; is that right?
A Right, sir.
Q And at the time that you were in the car waiting to go back into the store were you discussing the fact that you were going to go back in there and hold up that store?
A Yes, sir.

Q And at that time you did not know whether or not there were any weapons in the store, at least if the storekeeper had any guns; is that right?

A No, sir, I didn't.

Q Now, with reference to the .32 automatic, did you ever fire that gun?

A No, sir, not I.

Q In what condition was the gun when you had it, would you describe it, please?

A It had a broke grip on it. One part of the grip was broken.

Q Anything else about the gun?

A The clip was missing.

Q Do you know whether or not it was loaded?

[fol. 607] A No, I don't.

Q And you had your .38 caliber gun with you in the car between the two visits to the store; right?

A Yes.

Q And your gun was fully loaded with five shells; right?

A Right, sir.

Q And you knew that your gun would fire; didn't you?

A Yes, I think it would.

Q Well, you knew that it would as far as you were concerned?

A As far as I know, yes, sir.

Q Because you had fired it in the past; right?

A No, I hadn't fired it.

Q Never fired it on New Year's Day?

A No, I didn't fire it.

Q Did Fannie fire it in your presence?

A Yes, she did.

Q And you knew it fired on New Year's Day; right?

A New Year's night.

Q And you had that gun ever since New Year's 1966, in your presence after Fannie fired it that night; is that right?

A Right.

[fol. 608] Q Had it been fired again, as far as you know?

A No, not as I know.

Q So as far as you knew it fired on New Year's Day and on February 14 it was still in the same condition; right?

A Right, sir.

Q And as far as the .32, you had no idea whether that gun would work or not; isn't that true?

A That's right, sir.

Q And when you went back into the store the second time had you had any prearranged plan as to who was to do what?

A No, there wasn't any arranged plan at all.

Q So you were just going to go in there and as far as you were concerned, if no one was there, you were both going to the counter and hold the man up?

A I guess that would have been the way it was.

Q And you were going, both going to use your guns; right?

A Yes.

Q And you took a gun into the store that you didn't know would fire, whether it was any good or not; correct?

A That's right.

Q And you gave away to Mr. Wilkinson, you're telling us, a perfectly good gun that you knew would fire; correct?

A To the best of my knowledge.

[fol. 609] Q All right. You didn't know at the time you went in the store whether or not the person that was behind the counter had a weapon in that store or not; correct?

A No, I didn't.

Q Yet you still gave away a good gun for a gun that you knew nothing about; is that right?

A I traded a gun; that's right.

Q Why did you trade it?

A Mr. Wilkinson had something in his mind, sort of a complex against his gun. It would only carry one shell, and since we had made plans to rob the store, it would have taken two of us to rob the store.

Q Why would it have taken two of you?

A We normally do take two to rob a market, sir.
Q You knew how many persons were going to be in that market, didn't you?
A To be exact, no.
Q What hand did you hold your gun in when you were in that store?
A I didn't hold the gun at all.
Q You never took that gun out?
A No, sir.
Q You never took it out where the man was back there and you were holding him?
A No, sir.
Q What hand, when you hold a gun, do you normally
[fol. 610] hold it in?
A In my right hand.
Q In your right hand?
A Right.
Q You know that Mr. Wilkinson is left-handed; isn't that true?
A To the best of my knowledge, I couldn't say.
Q When he holds things or does things, he does them with his left hand as far as you could tell; isn't that right?
A Not to my knowledge.
Q Now, when you went into Pon Lock's store, you came up to the counter and Mr. Wilkinson went to the back of the store; right?
A No. We both went to the counter.
Q Then when you pulled your gun out, Mr. Wilkinson went to the back of the store; right?
A No. Mr. Wilkinson was already in the back of the store.
Q You had a prearranged plan, then, with Mr. Wilkinson that you would cover the front of the store and he would cover the back of the store; isn't that right?
A Something to that effect.
Q You had the same plan at the Venice market, didn't you?
A No.
[fol. 611] Q Why did you change the plan?
A It would be hard to answer. I couldn't say.

Q Well, you must have had some reason. Think back if you can.

A No, no reason at all.

Q When you came into the Pon Lock store, Mr. Wilkinson was at the back of the store, you were at the front, and what did you do at the counter? What's the first thing you said?

A I just asked for the money.

Q Well, didn't you ask for a bottle of wine first?

A Yes. There was something said in that effect.

Q That's the way that you went into that store with a pre-intent of going to the counter asking for a bottle of wine, and then you were going to hold it up; right?

A Right, something like that.

Q You didn't discuss this plan with Mr. Wilkinson about buying the wine in Pon Lock's store, did you?

A Yes. Something was discussed in that effect, wine or either beer.

Q Wine or beer; right?

A Right.

Q But you were the one that decided to buy the wine [fol. 612] in Pon Lock's store; right?

A I am the one that had the money.

[fol. 613] Q You are the one who decided to buy the wine; right?

A No. There was no one decided to buy what item. I had the money.

Q But when you went up to the counter and you spoke to Mrs. Pon Lock, you said you wanted to buy some wine; right?

A That's right.

Q You did not discuss with Mr. Wilkinson that I'm going to go in there and buy wine? You said, "I'm going to go in these and buy something"; is that right?

A That's true.

Q When you went into the store at Pon Lock's it was your intent to buy wine? That was in your mind; right?

A Right.

Q Wasn't that your intent when you went into the Venice Boulevard store?

A No.

Q Now, did you give any description to the police of the man that you were holding by the beer case, the back of the store?

A No, I did not.

Q What's the description as you remember it today?

A He was dressed in khakis, sort of an elder man, [fol. 614] I would say, in the neighborhood of five feet eleven, six feet tall. I'd say in the neghborhood of weighing between 190 pounds and 210 pounds, to the best of my knowledge.

Q You knew that there is a big difference in a robbery as to who shoots a person when somebody is killed at that time, didn't you?

A No, I don't.

Q Well, you knew when you were talking to the police that there is a difference as far as a robbery as to the person who actually pulled the trigger, didn't you?

A I know who would have shot a person if I was there.

Q Pardon me?

A I would have known who shot the person if I was there.

Q All right. But you also knew at the time you were talking to the police on March 2, 1967, in the Bakersfield jail that it's a big difference as far as who actually pulls the trigger when more than one person is involved in a robbery and there is a death caused while in the commission of this robbery, didn't you?

A I don't quite understand you, Mr. Bornstein.

Q You knew that there was a difference between two persons involved in a robbery where one of the two persons kills a person, didn't you?

[fol. 615] MR. LLOYD: Your Honor, I don't think that's necessarily correct.

THE COURT: I am going to sustain the objection on the grounds it is calling for a conclusion of this witness.

Q BY MR. BORNSTEIN: You didn't give the police any description of this person at the time you spoke to him on March 2, 1967, did you?

A No, sir.

Q The first time that you ever heard this description was yesterday when Mr. Wilkinson described this person; isn't that true?

A The first time, yes, sir.

Q That's what you stated today, the same thing that he said; isn't that true?

A No, sir.

Q Now, Mr. Watkins is related to Fannie Lue Smith?

A To the best of my knowledge.

Q You had seen Mr. Watkins before the trip up to Bakersfield somewhere around the early part—late part of February of 1967; isn't that true?

A That's true, sir.

Q You knew that he was related to Fannie Lue Smith, didn't you?

A To the best of my knowledge.

[fol. 616] Q And Fannie Lue Smith was your friend you were living with; right?

A That's right.

Q You heard Mr. Watkins testify about conversations that were held—that had been held in the car when you were traveling to Bakersfield; right?

A Yes, I did.

Q He said that you were doing all the talking. That's true; isn't that correct?

A That's true.

Q You were the one that said that you saw Rodney—the man pointing at Rodney and that he was shot; right?

A No, I don't think I would say—

Q What did you say about this?

A It would be hard to say now, sir.

Q Well, now, you heard Mr. Watkins' testimony. The question was asked of him:

> "All right. Would you relate what the first thing that was said about trouble in Los Angeles?
>
> "A Well, Dennis said this guy was aiming down at Wilkinson and it was either his life or Wilkinson's, so he chose his."

Now, you said that; right?

[fol. 617] A I don't recall saying that, but if I did, I might have. I don't know, sir.

Q Why did you say that? if you think you did.

A I didn't say I said it, Mr. Bornstein. I said if I did said it, I might have said it. I'm not sure.

Q Then were you asked this question, or Mr. Watkins was asked this question:

> "Q All right. Will you tell the jury what that conversation was in connection with the shooting from your recollection?"

Again, you were the one that was talking to Mr. Watkins; right?

Did you give this answer?

> "A I said, 'Well you mean you shot the guy', and he said, 'Yes, I shot the guy.'
>
> "Now, who was saying this?
>
> "I can't say who was doing the talking. He said the guy died shortly thereafter."

But you were the one that was talking; is that true?

A I was not talking to Mr. Watkins. I was talking to Mr. Rupert, Eddie Rupert.

[fol. 618] Q But you are the one who told Mr. Rupert, "I was the one that shot the guy," right?

A No, sir.

Q Now, the gun was returned to you, People's 3, the big gun; right?

A It was.

Q And between somewhere at Fannie's house and Bakersfield, the gun was reloaded with five shells in the gun when it was taken into custody at Bakersfield; isn't that true?

A No, sir. The gun had five shells in it but it wasn't loaded between here and Bakersfield, it was reloaded in Los Angeles.

Q Who reloaded it?

A I did, sir.

Q Why did you reload the gun?

A Normal procedure.

Q It is your normal procedure to keep it loaded; right?

A I guess it would be anybody's normal procedure.

Q But it is yours; isn't it?

A I don't think I quite understand you, Mr. Bornstein.

Q You reloaded that gun because it is your normal procedure to keep that gun loaded; wasn't it?

A I have had it completely empty.

[fol. 619] Q How much money was taken from the market in Venice?

A To be exact, I couldn't say, sir.

Q How much did you get?

A Somewhere in the neighborhood of twenty some dollars.

Q Do you drink wine?

A Occasionally.

Q And you drink wine as a preference over beer? You'd rather drink wine than beer; wouldn't you?

A I drank occasionally any kind of beer, wine, whisky.

Q But it is your preference, you like wine better than beer; don't you?

A No, I don't, sir.

Q Do you drink Gallo tawny port?

A I have occasionally.

Q And do you remember talking to the police when they asked you about Gallo tawny port up in Bakersfield?

A I believe I do, sir.

Q And do you remember telling them that you didn't drink Gallo tawny port at all?

A No, I don't remember telling them I didn't drink Gallo tawny port.

Q Were you asked this question, "Well, do you drink tawny port?"

"A No, I don't."

[fol. 620] "Q You don't drink Gallo tawny port at all?

"A No, I don't."

Do you remember those answers and questions?
A No.
MR. BORNSTEIN: Thank you, I have no more questions.
THE COURT: Anything further?
MR. BORNSTEIN: No, your Honor.
THE COURT: Miss Obera?

FURTHER CROSS-EXAMINATION

BY MISS OBERA:

Q Mr. McGautha, did you buy the wine at this Smetana market?
A Yes, I did.
Q Now, you also made the statement to Mr. Bornstein, "I had the money."
Do you recall you just said, "I had the money?"
A Not the money from the market. I have money.
Q You mean not the money from the Smetana market?
A That is true.
Q But you had money when you went into the store?
A Yes, I did.
Q And that is how you remember that you bought [fol. 621] the wine?
A Yes, I do.
Q You distinctly remember buying the wine?
A I paid for the beer and the wine.
Q You are talking about when you went in the first time?
A Yes, ma'am.
Q The second time did you buy any wine?
A No, ma'am.
Q Did you buy anything?
A No, ma'am.
Q Why did you take a gun in the store?
A The gun was in my pocket.
Q I understand that, but why did you take it in the store?

A I don't know. In between the exchange this gun was given to me and I gave him mine and I just stuck it in my pocket.

MISS OBERA: I have no further questions.

THE COURT: Mr. Lloyd?

MR. LLOYD: Nothing further. Thank you, your Honor.

THE COURT: Mr. Bornstein?

MR. BORNSTEIN: Nothing further, your Honor.

THE COURT: You may step down.

Mr. Lloyd, call your next witness.

MR. LLOYD: Mr. McGautha will rest, thank you, [fol. 622] your Honor.

THE COURT: Anything further from the People?

MISS OBERA: People rest, your Honor.

THE COURT: Anything further from defendant Wilkinson?

MR. BORNSTEIN: Defendant Wilkinson rests, your Honor.

THE COURT: Let me see counsel at the bench, please.

(Conference at the bench was not reported.)

THE COURT: All right, everyone having rested in this matter, we will hear now from counsel.

Miss Obera?

MISS OBERA: Ladies and gentlemen of the jury, in a very short while now you will go into the jury room and you will face the moment that we talked about a week or so ago, and at that time you will begin to realize how great this burden is that you have undertaken because you will be in that jury room with the lives of two people in your hands and I mean that sincerely because when you sat here on the guilt or innocence phase of this case you listened to about 40 minutes of instructions and those instructions were given to insure that you reached a just verdict and to insure that you made no mistake in the result of your deliberation, but now when you come to this very serious part of the case, this matter of penalty, you are going to find that you do not get any help from the Court in reaching the proper penalty.

[fol. 623] You are going to find when you get in that jury room and after listening to the few instructions that are given, that Dennis McGautha will live or die in your discretion, and you will find that Rodney Wilkinson will live or die in your discretion, so I don't believe that there is anything that I can say to you or that counsel can say to you that is going to greatly affect your verdict.

A lot will depend upon your views of life and death and your views of justice and mercy, perhaps, but I would like to say a few words in the hope that they will aid you in placing this matter of the death penalty in perspective, and you might take it from there. You might consider these points in your deliberations. They may aid you in deciding whether or not as to each defendant this is a proper case for the death penalty.

You will recall on voir dire each of you was asked whether or not you could impose that penalty in a proper case and at that time you probably had no notion of what constituted a proper case and you probably expected that you would get some guide lines from the Court, but you are going to find those guide lines are few.

One thing you might consider, one point of reference in determining what is a proper case, would be to have an understanding of first degree murder, because it is only first degree murder and kidnaping for the purpose of robbery with bodily injury for which this severe pen-
[fol. 624] alty is allowed.

Now we do not have, of course, kidnaping for the purpose of robbery with bodily injury here, so in assessing a proper case it seems to me you should have some notion of the different kinds of acts which constitute first degree murder.

First degree murder, and I believe you were instructed on this, I know you were instructed on this when you went out the first time, is a murder which is perpetrated by torture, by poison, by lying in wait, by any other kind of premeditated and deliberate killing, or a murder which is perpetrated during a robbery, a burglary, an arson, a rape, a violation of Section 288 of the Penal Code, commonly known as child molesting, and the commission of mayhem.

Now those are the only instances in which the death penalty is allowed and I'd like for a moment, in placing these ideas in perspective, to compare this particular killing with the kind of killings for which the death penalty is allowed.

I think it may be a little bit easier for a jury in making an assessment of the proper case for the death penalty if they had a case which is particularly gruesome, but remember that the thing which is punished with death is the act of killing itself and not any other circumstances that attend the murder.

[fol. 625] For example, you might find a case where a person is murdered and then the body is dismembered, and that is very gruesome, and it would seem to me that a jury in a case like that would have no hesitancy in bringing in the death penalty. But you realize, I am sure, that once there is the death, then the crime of murder is committed and the disposition of the body is just one of those many circumstances.

Now comparing this killing with torture, probably we would agree that torture would be a more terrible way to die, and the person who tortured his victim to death would certainly be high on our list of persons deserving of the death penalty.

All right. Then the next kind of first degree murder, a poisoning. Now it is conceivable that a person could be poisoned and suffer little or no pain, or, if suffering pain, would not know the cause of the pain and would not experience the dread or the terror that would come from being shot.

It is possible in some cases that a poisoning could be worse than a shooting, and it is possible, it seems to me, in other cases that a poisoning may be less cruel a murder than lying in wait.

Now, lying in wait is no more than ambush, and the person could be shot from ambush, as well as killed in other ways from ambush, and I think you will agree [fol. 626] that a person shot in ambush, from ambush, if he dies immediately, would probably not suffer any more or even as much as the person who faces this gun, who has that moment of terror, or when he knows it is

his money or his life and then going beyond that he finds out it is going to be his life even though he has given up his money.

Robbery is one of the circumstances which I have mentioned, and I will go back to robbery. Rape is another circumstance.

Now we don't like the idea of a rapist in the community and it offends us very much to think of a person being murdered under these conditions, but remember that the law does not punish with death the act of rape, the law only punishes with death the act of murder.

[fol. 627] Then we can look at arson. Now, that would be a terrible way to die. I can imagine the fire, and the arsonist is probably a person, if he did it intentionally, with whom we would have no sympathy at all, and he would be probably second to the torturer on our list of persons who should suffer the death penalty.

In the burglary instance, we have the same kind of situation that we have in a robbery case. The victim might very well be surprised and killed, or might face the gun just as he does in a robbery case.

Mayhem involves the cutting off of a part of the body, the ear, or mayhem can even go—be so light a thing as the slitting of the lip, I believe. If you set out to do some—to disfigure the body in some way, and in the course of that act cause death, then the penalty is available.

In the case of child molesting, again, there is an act which offends the community's sensibilities, but again even the worst case of child molesting is not punishable with death. It is the act of killing itself which places that crime in the category of those crimes for which the death penalty can be imposed.

Now, I would like to talk about robbery cases in which murders are committed, and point out to you that there may be circumstances where a person would be guilty of first degree murder because of a killing having occurred [fol. 628] in the course of a robbery and still be a person who you might not consider as a proper candidate for the death penalty. If you will recall the instructions which you had on the felony murder trial, you found that

the person was guilty of first degree murder whether the killing was intentional or accidental, so you can conceive of an instance where a person goes in to commit a robbery, does not intend, we will say, to commit a robbery, and the gun goes off and accidentally kills the victim—I said to commit a robbery; to commit a murder. The gun goes off and accidentally kills the victim. That person would be before you on penalty, but still I am sure in your minds you would distinguish between the person who killed in that manner and the person who killed deliberately and in cold blood.

In this particular case, taking all of the evidence we have heard, it seems to me that you must agree that this was a cold blooded killing. There was no reason at all for Mr. Smetana to die except for the cruelty, the inhumanity of this person who shot him, because Mr. Smetana had given over the money and he didn't resist. There isn't any evidence anywhere that he resisted, and he didn't have a gun. He was unarmed. And another thing about Mr. Smetana. I can conceive in some cases where a person is unarmed and doesn't take any aggressive action against a robber, and still you might under-
[fol. 629] stand how the robber could panic and kill that person. I have reference now to size. If Mr. Smetana had been some gigantic man, let's say, six foot four, and weighed two hundred and some pounds, and the defendants were faced with him and they saw him make any kind of movement, maybe—and this doesn't—we don't ever have justification for killing a victim of a robbery, don't misunderstand me, but I am just talking now about distinguishing one kind of killing from another. This big man might pose some threat to a person just by reason of his size, but you have the autopsy report. Mr. Smetana was six feet three—I am sorry—five feet three inches tall. He weighed 135 pounds. I would suggest Mr. Smetana could have been robbed even without a gun. He could have been robbed by force, and yet here he was killed for no reason.

[fol. 630] Now, in placing the question of the death penalty in perspective, I would like to use as another point of reference the idea of the protection of society.

When we talk about the protection of society, it sounds like something that is very abstract and it is a little difficult for us to consider an abstract principle like the protection of society in the face of a concrete principle like I'm going to say this man has to die, but just bear with me for a moment, because one of the main arguments that you hear in discussions about the death penalty is, does society have the right to take human life. It is a question that is asked over and over again. It is suggested that if society takes human life, then then society is no better than the murderers.

Now, we all recognize in the individual the right to self-defense. It is a principle of law, and it is a fact that we each recognize the right to self-defense. If Mr. Wilkinson and Mr. McGautha had walked in that store armed to rob Mr. Smetana, and Mr. Smetana had taken out a gun and killed both of them, there could be no complaint about Mr. Smetana's conduct because he had that right to self-defense.

Now, I would suggest to you that society also has a right to self-defense. The self-defense of an individual is limited, and when the danger ceases, the right ceases. For example, if persons came in to shoot Mr. Smetana, [fol. 631] Mr. Smetana shot them, fine; he exercised self-defense. But suppose he pulled his gun, they got away, and then he goes out searching for them a couple days later. He sees them walking down the street and he kills them. We would say he has lost his right to self-defense because the danger has ceased.

But how can we say when the danger to society ceases if we have people walking around in the community armed and willing to commit robberies and murders? Think of the protection of society.

Then let's—if this is still hard for you to accept, if it is still hard for you to believe that society has a right to take life, I would like to ask you to consider society's right to self-protection on a different level. I have reference now to war. Now, there are many people who are unsympathetic with the present war in Vietnam. But we know that there have been wars which have received full public support, not because we want wars and not

because we enjoy wars, but because we must protect ourselves either against ideologies which are unacceptable to our way of life or to armed aggressors.

The society in which we belong and which we support and whose leaders we elect has never hesitated in protecting itself to call upon the men in our country to kill for its protection. So it doesn't seem such a monstrous burden, such a montrous thought, that that society may [fol. 632] call upon other of its members to impose a death penalty for its protection. Now, going beyond just a little bit, this idea of society calling upon these young men to be killed, it even goes further to kill—it goes further and it says to these young men, not only do we ask you to kill for our protection, but we ask you if necessary to give your lives for our protection. These are not robbers and these are not murderers. These are some of the finest young men that our country produces that we ask to die for society.

Now, I would like to speak for a moment about mercy and justice, because in your deliberations surely you will consider mercy. But I would suggest to you that justice is broad enough to encompass mercy, and we have the matter of mercy covered when we have an instruction that tells you it is in your discretion whether to impose the death penalty or to impose life imprisonment. You know all of the factors that you can take into consideration in determining whether this is a case in which you should be merciful or whether or not this is a case in which you should impose that severist penalty.

I would caution you about one thing. We know sometimes that justice, or what we call justice, is not really that but is simply brutality, really, and I am not speaking so much in our country, but we know that sometimes what parades as justice is really brutality. Of course, [fol. 633] we don't want to do that here, but also it is very possible where nobody can argue with what you do later to let yourselves say that what you are doing is being merciful when, in fact, what you are doing is stepping away from a responsibility which you have undertaken. So I would say this. Don't let faint-heartedness parade as mercy if you are convinced that this is a proper case for the death penalty.

[fol. 634] And then, another point of reference in assessing whether or not this is a proper case, would be this: Why not impose the death penalty in this case. That sounds a little harsh, but when we started out we had people here who had no preference either for life imprisonment or death, but we all know about reasons why life should be preserved and those reasons are deeply ingrained in our earliest childhood.

Now, we can see that we have an obligation to preserve life, but if we have no preference for one penalty or the other, then it seems to me we should not ask ourselves necessarily, why should these men die, but we should also ask ourselves, why should these men live.

I have been talking in general terms and now I want to talk about men. I want to talk about Mr. Wilkinson and Mr. McGautha, and their particular crime.

I am sure, or I would suspect that in your deliberations on the matter of guilt, one thing concerned you very much, and that was who pulled the trigger, and now you heard each defendant's side of what happened, and now chances are you have your mind made up about who pulled the trigger.

There have been many statements of fact on both sides. It seems, because both of these defendants have been impeached in their testimony, it would make it a little bit easier for the jury if the one who didn't pull [fol. 635] the trigger had come in here and been perfectly honest with you, and if that person then could not be impeached you'd say, "Well, this person told the truth all the way through, and I am satisfied. I know who was telling the truth and I know who was lying and I know the one who is lying is the one who pulled the trigger."

I'd like to, I'm sure the Court will tell you that you can consider everything that you heard on the matter of guilt in determining the penalty, and the only thing in this case that indicates someone other than Mr. McGautha may have pulled that trigger is Mrs. Smetana's testimony and Mr. McGautha's testimony, of course.

But Mrs. Smetana's testimony was that the person who came in and bought the wine was the person who

pulled the gun on her. The person who did all of the robbery.

You see, there is some confusion in her testimony one way or the other, because it is hard to understand how she would confuse Mr. Wilkinson with Mr. McGautha; very hard to understand. They look nothing alike.

However, the two men—We can understand that maybe everything she was telling us Mr. Wilkinson did he did, and he may very well have, even though he sits here and tells you he didn't hit her with the gun. It seems to me she would know who hit her with the gun if she [fol. 636] knew nothing else. Remember this, she doesn't know who fired the shot and she saw only one gun and you have seen those guns and she said she didn't know anything about the guns.

We know that the .38 killed Mr. Smetana and we don't know, and even the expert on balistics couldn't tell us where the bullet came from when he looked at the pictures of the store, when he looked at the diagram of the store, when he looked at the autopsy surgeon's statement of how the bullet entered the body. He could not state with certainty where that bullet came from, and Mrs. Smetana could not say with certainty where that bullet came from, but putting all of the evidence together, and trying to be objective about it, because for the prosecutor as well as for the jury, there is no victory in having a severe penalty imposed upon a person believing at the same time that that penalty is not merited, so it is important to consider who shot that gun, and putting everything together and try to look at Mr. McGautha as an individual and Mr. Wilkinson as an individual and not favoring one over the other, and taking into consideration the testimony of all the witnesses, it would appear that what happened was Mr. Wilkinson went up there and hit Mrs. Smetana with a gun just as she said, but Mrs. Smetana could not identify that gun and the gun which Mr. Wilkinson had was his own gun, and the shot [fol. 637] came from behind Mr. Wilkinson and Mr. McGautha fired his .38 and killed Mr. Smetana. And I say this not just to try to reach some kind of conclusion, but

all of the testimony of the witnesses, with the exception of Mr. McGautha, pointed to Mr. McGautha firing that gun.

Even Mr. Watkins, who if he wasn't friendly to anyone, was friendly to Mr. McGautha.

Erma Gean, of course, had an interest in Mr. Wilkinson and maybe she would lie for him, but the thing about Mrs. Dupree as she sat here, I don't think anybody was overly impressed with her intelligence and you'd wonder how she could be as consistent about her statements so that they would conform with what the other witnesses said.

Now, she didn't know one kind of gun from another, and I am wondering if anybody here believes that she understood the importance of how the guns ejected the bullets, and she tells us Rodney pulled the top back on the gun and Dennis broke the gun open.

Everything points—And even going along with Mr. McGautha's statements, you see it could have been that everything happened the way he said it, and he still broke the gun open in the house, but he denies that, and there are so many denials on the part of Mr. McGautha which do not seem to be truthful, and I am referring now to the testimony of that officer who came in here [fol. 638] yesterday, and that officer knew him. He was working undercover and he didn't know him like a police officer. He knew him like a friend. That is what they do. They go around with these people that they think are engaged in criminal activity and pretend to be one of the criminals.

He says he knows of an instance where Mr. McGautha slept with a .38 under his pillow. Mr. McGautha said, "I have never slept with a .38 under my pillow."

He says, "I have heard him talk about how fast he could pull this gun out of his waistband."

And I believe he said he saw a demonstration of it, and Mr. McGautha said, "I don't pull a gun out of my waistband." Things like that.

That officer's testimony was very credible. There is no reason why in a case like this he would come in and tell that kind of a lie. He has no connection with this

case where that kind of a lie might send this man to the gas chamber, but yet he was willing to come in here and give this statement about Mr. McGautha and that .38, and his fondness for that .38.

And it is very interesting that Mr. McGautha never let anybody use that .38. I think that was his own testimony right here from the stand, except on that occasion when he turned the gun over to Mr. Wilkinson.

One thing that makes the burden of the jury a little [fol. 639] easier in this case, I believe, is the fact, you know, you have two murderers here. That is, murderers under the law. Regardless of what penalty you impose, you can be sure that you did not impose a penalty on innocent men. You heard their testimony from the stand and you put that testimony with those circumstances and you know both of them are robbers and both of them are murderers.

And then you have Mr. McGautha's record, and I know that nobody wants to have a man die because of things that he has done in the past for which he spent time in prison and which are not related to the particular killing about which this penalty is being conducted, but the jury is entitled to know, and that is why this kind of evidence comes in, what kind of a person are they dealing with in determining whether this man should just be imprisoned or this man should die, and Mr. McGautha has a terrible record.

He has three robberies. He has over ten years in prison, and he has another killing, and you will have all those documents in front of you in the jury room about his prior record, and the thing about his prior record is the way in which he minimizes his involvement. [fol. 640] Can you imagine that the first prior I think we had on him was a robbery, and he has the nerve to sit up there on the witness stand and tell people who he is asking not to kill him—he has the nerve to tell those people, "I pleaded guilty to robbery, but I didn't really do that robbery", and then he tells them about the second robbery. The friends whom he was giving a ride were involved in that second robbery. He didn't commit that

robbery, but he pleaded guilty to it. He got sentenced to 10 years and he served six years.

What kind of person do we have here who, having spent all that time in prison, still is unwilling to acknowledge his participation in crime.

Then how about the man he killed? He said, "I got in a fight. I think it was over some property, and he died." He didn't know if he died of a heart attack or just how he died, and so he says he died two days later. Well, what did he die of? He got cut. Not I cut him. He killed that man. If that was murder without malice, and that's what he pleaded to, it means it is murder without malice, or manslaughter as we know it here in California. But he did it and he is unable or unwilling to accept responsibility for acts of which he has been convicted, I would suggest to you that that same attitude has carried along throughout his life because his first [fol. 641] crime was committed at age 23, I believe, and now he is 41, and he has had this same pattern of robberies and a murder, not connected with a robbery.

Then one of those robberies was a robbery by assault, whatever that means. It sound very much like the same kind of robbery that we have in this case.

Then he made some comments which I think are particularly important in assessing whether or not this is a man who could ever take a place in society, inside a prison or outside a prison. When he told us that he was covering up for Rodney with Mr. Watkins, and he said, "I told him that the man was aiming down on Rodney because I wanted them to accept Rodney", and I said something about, "You mean you told them that when you knew that Rodney was a cold-blooded murderer", and he says, "I don't know what you mean by cold-blooded."

That ought to tell you something about this man.

Then on the questioning here that Mr. Bornstein did of Mr. McGautha when Mr. McGautha was talking about guns and robbing stores and things like that, and he says, "Well, that's what a person would normally do", and he asked him why he made certain misstatements to the police. "Well, that's what a person would normally do".

I would suggest to you that a person on trial for his life would normally lie to you, but not necessarily, but [fol. 642] maybe necessarily in this case because there is no alternative—try to place the full blame on some other person.

I have an opportunity to address you again, but I will not do so because there is no reason for my saying one or the other or both should die, and then counsel saying they shouldn't die, and my coming back and saying they should die, because you have all the burden now. Then the last words said from the defense, it will all be in your hands, and your own views and your own ideas, your own conscience will dictate what the proper verdict is.

But I would ask this of you. Seriously consider whether or not the death penalty should be imposed on both defendants, and as to the person who was Benjamin Smetana's killer fix the penalty at death.

Thank you.

THE COURT: Thank you, Miss Obera.

Ladies and gentlemen of the jury, we will take a 15-minute recess at this time. Please once again bear in mind that admonition that I have given to you on numerous occasions about letting anyone talk to you about this case, directly or indirectly, about talking about the case among yourselves, or forming or expressing any opinion on this matter until it has been finally submitted to you.

We will take our morning recess and be in recess for 15 minutes.

[fol. 643] (Morning recess.)

THE COURT: All right. The case of People versus McGautha and Wilkinson, the record will reflect the appearance of both defendants, all counsel, and the jury in their respective places in the jury box.

Mr. Bornstein, you are going to address the jury first?

MR. BORNSTEIN: Thank you very much.

THE COURT: All right. You may.

MR. BORNSTEIN: About the time of the 19th Century, Oscar Wilde wrote a book. The name of the book was "The Picture of Dorian Gray", and in the forties

or fifties it was made into a motion picture. The theme of the story was a man's life as it was depicted upon a painting that was painted of him. This painting was an extraordinary painting in that it was not hung in the living room or in an area where it would be exhibited to people who would come to visit the home or the residence, but it was hung in the attic. The picture, as the man lived his life, reflected the inner person. It showed what kind of a man he was, and at the end of his life it showed that he was a person of low moral character, a person who had lived a very dissolute and very obscene life.

In a sense, what we have done here the last two weeks is to attempt to paint a picture for all of you, because if you will recall when we started out questioning you [fol. 644] as jurors the major part of the questions that we—at least that I asked went towards being fair and impartial and towards your feelings about the death penalty. When a case like this is being handled and you look at it, you work with it, you live with it for several months, you form your own opinion. You know what it is about. This is our business. We try to evaluate it as best we can. And evaluations that I placed upon the facts as I wanted to present them to you have to do with not whether Mr. Wilkinson was guilty or not guilty, but whether he should live or die. If you will reflect upon the type of questions that I asked of all the witnesses, it had to do with his participations, participating in these various events that took place. It had to do not with identification or trying to confuse somebody or mix somebody up, but with his involvement. In presenting the defense that we presented, our defense was not to his innocence or guilt, and, as you know, there was no question about it in my mind—I am sure there is none in yours when you found him guilty, and there is none now, because there can't be, that both of these persons under the law were in fact guilty of murder, and it was murder in the first degree.

But the important thing as far as I was concerned is whether or not Mr. Wilkinson, 26 years old, shall live or die based upon your determination as to whether he

should or should not live or die. In presenting the picture [fol. 645] of his life in a capsule form, we have attempted to paint the picture of Rodney Wilkinson, and I am sure you will agree with me, there was nothing presented of a derogatory nature up until December or October of 1966. We brought Miss Henry on who testified that she had lived with him. Now, this you may feel is wrong. I mean a person's morals, things that he does, I cannot agree with, you may not agree with, but I think when you look at it with the reflection as to whether or not he should live or die based upon what happened in this case, I think it is a very minor part, so you have a blemish on his picture. But, over-all, it is a picture of a rather unblemished person who has lived a life for some 25 or 26 years, and then meets a young girl, 18 or—I guess she is 20 now, or 18—I'm not sure—Erma, and he lives with her, and even with his relationship with her, basically what he tries to do is to take her away from the relationship that she has had.

[fol. 646] The reason that he went out and involved himself in these things is not so much that he wanted money for himself, but because the little girl, eight months old, was hurt and he wanted to take her away from this and he needed quick money. That is wrong. There is no question about it, but other than this, up to the point of the actual robberies he has lived a good life.

In determining the fate that shall befall him you have to determine it by, I think, three things.

One, what kind of a person was he before the act that caused the death of an innocent party.

Two, what was his involvement in this activity that caused the death of an innocent human being, and,

Three, what was his reaction afterwards, because I think all three are of equal importance.

As I told you when we started Mr. Wilkinson's case that in no way do I want to reflect upon Mr. McGautha. That he has a right to present his own defense as best he can. If he choses, or Mr. Wilkinson choses not to tell the truth to you under oath, I can understand it, and I think you can too, because when you are faced with the fact of shall I live or die and how can I best

help myself, a person with weak character will, and people with strong characters will many times, will take the easy way out. I can understand it.

[fol. 647] With reference to a person like Mr. Watkins, I can't understand him, because he knows that a person is facing life or death here and he changed the story from the time he spoke to the police at the preliminary hearing until now, but I can understand and I can reflect with feeling towards Mr. McGautha's position, and that is why in all of our determinations it was not with reference of taking and saying, "You did it." "He didn't do it." And, if you will remember, Mr. Wilkinson's testimony, which I think is of great importance because it basically shows the character of him, he didn't say he did it. He said, "I didn't do it." There is a big difference.

What I attempted to do by questioning Mr. McGautha and questioning the other witnesses was to put the mark of Cain where it belonged, because if a person has killed another person I know this must be of great importance to you in your determiantion as to whether this person shall live or die, and if there is a question as to who did it, I think that it is of the utmost importance that, as an attorney representing one of the partisans in this action, that I do the best that I can to put the mark upon the person who deserves the mark, and that is why I questioned Mr. McGautha, and that is why I am arguing with you today, or, to you today not so much to slip the burden upon a justifiable party but merely to present the evidence to you with reference to the [fol. 648] shooting as best can be presented to you so you can make your determination.

Some of the things that I brought out with reference to exchanging the gun, I think these things speak for themselves.

Miss Obera has spoken eloquently in determining the People's position and I can only say that this would appear, based on the evidence, to be a proper interpretation.

There is a difference, however, I think, with reference to the striking of Mrs. Smetana, because Mr. Wilkinson said that he was the one that got the wine. He had a

green outfit on and Mr. Wilkinson had a beige one. I feel that Mrs. Smetana, and she has every right to be upset, shaken up, disturbed, was incorrect with the two parties, but the rest of the information that she gave you, I feel, is quite correct.

So when you look at Mr. Wilkinson, you say, well, he had a good life prior to October, November, December, January, and February. He had an involvement that would appear from the evidence to be not the participating person as far as the actual shooting but a person who went along because he wanted easy money, and that is what he wanted, no question about it.

And the third point is what were his reactions afterwards. Was he contrite. Was he sorry, or did he try [fol. 649] to bluff, lie, cheat, do anything that he could to get out from under. And you see from the fact that he brought out in the penalty phase that he made a complete confession after he had been advised of his rights, he told Reverend Davis that he was involved with it, and that he was horrified, and that he told Reverend Davis, or, he asked him to pray for him. And this is, I think, is quite important because you'd say, "Well, why should the Reverend pray for him. Why shouldn't the Reverend pray for Mr. Smetana." Because Mr. Wilkinson, when he says this, doesn't say to, "Pray for me to get out from under," because he just told him, he says, "I'm involved, I know it." He says, "Pray for me because I know that I have been wrong and I need help."

This is what he says and this is what he means when he says, "Pray for me," and in a sense, it looks, when you analyze it from the surface, it looks like he is a selfish type of person. He isn't because he is asking Reverend Davis to, "Pray for me to help me because I have wronged in the past."

So when you look at the picture that has been painted of Mr. Wilkinson and this will hang in his attic wherever it will be, it will be carried with him for the rest of his life, you see a person 26 years old that, through the mischance of picking up a girl at a bus stop, becomes involved with people that he had not been involved with [fol. 650] before.

He is not a bright person because he told you that he had been rejected after serving time in the Army because of a low IQ status, and of not being a leader, not being an aggressor, but being a person that because of peculiar circumstances that he found himself in went along with somebody else.

And you can follow this out from the friend of his, Mr. Belman, or Bowman, I believe, the young man that came in and testified that up until this time he was hard working. He worked with him. They were like brothers, and then all of a sudden he was no longer sending money to his mother but he was asking his mother who probably needs the money much more than he would, to send money to him.

But you see, the money that he was asking for from his mother was not for him, because up to the time that he met Erma he was earning a decent form of living. He was working. He was doing what most people would do, try to get along in a struggle. A person that makes a dollar eighty-seven an hour, a minimum wage. But he still didn't get in any trouble.

[fol. 651] But only because of the circumstances of meeting Erma, and through Erma meeting Guy Jones and meeting the rest of the group has he become involved. I think from this you can see that he is not basically a bad person. He is not basically a person that, if he had been raised under different circumstances, or had a proper home here, or maybe met a nicer person and married this person, that he would be involved here. He is not a person that I think would deliberately try to hurt somebody. He is not a person that would go out with a gun, because if you look at the description of the gun that he had, he didn't even know if that gun would be used or could be used. But he is a weak person, a person who is easily led, a person who probably fell in love with a cute young lady that he wanted to help, and in his low mental state and his ignorance and his anxiety to try to help her, he goes along with the life that she has been leading, in a sense, and he is led down the path where ultimately an innocent human being is killed.

So then you must say to yourself, now, we are at the

stage—we have discovered all of the things that we are going to discover. We have looked at the painting of Mr. Wilkinson. What shall his punishment be? You have the option, you know, to put both of these persons in the gas chamber. I would not stand here before you and, say, use it as a bargaining point, one is good or one is [fol. 652] bad. It is wrong. It is as wrong as wrong can be. You must look at each one of these persons as an individual as I asked you earlier, would you, and you said you would. You must look at each one and say, "What kind of a life has he led up to this point? How did he get involved? Was he the ring-leader or was he merely going along? What did he do afterwards?"

These are the things that are of importance.

As it is, you know, he had to go to prison, that the term is improisonment for the rest of his natural life; whether he will, or will get out in the future, that has no bearing on your determination now. Your sentence would be prison for life. You must say, "Is he such a bad person? Is he a person who at the end of his life would have a painting such as Dorian Gray had, that there is no reclaiming features, there is nothing left within this man that is worth saving". If so, then you must say, "Well, he should die." But, if there is something, if he can be saved, if there is a future for him, even if it is in prison for the rest of his life, I would ask you based upon the evidenct that was presented, his statements, the statements of the people that knew him for two or three years, that there is plenty here that can be saved. There is plenty here that is worth working with, and there is a human being that, through the chance of fate, is here before you because he picked a girl up at a [fol. 653] bus stop, and not a person that's led a life of accumulations of wrongdoing, of bad thinking, of improper living, up to this point.

I would ask you, based on the evidence, to put Mr. Wilkinson in prison, but not to put him in the gas chamber.

Thank you.

THE COURT: Thank you, Mr. Bornstein.

Mr. Lloyd.

MR. LLOYD: Thank you, your Honor.
Ladies and gentlemen of the jury, there is no doubt
out the guilt of both defendants. That's been resolved.
never was really in serious contention. This entire
se reminds me of a story I heard about a widow who
ok her little boy to his father's funeral, and at the
neral, as people are prone to do, they started tossing
uquets about what a loving father this was, what a
ing husband this was. This disturbed the little boy
cause this had not been the man that he had known
his father, because his father was despicable, no de-
ncy about him. But the little boy was smart. He said,
lama, all the good things they are saying about that
an in the coffin, would you please look in there and see
that's my daddy?"
And his mother looked in that coffin and, to her sur-
ise, to her surprise, ladies and gentlemen of the jury,
was her husband, and he wasn't a husband that she
ol. 654] had known, either. The husband that she had
own was mean, brutal, didn't support his family, he
d, he cheated.
That's my predicament. Mr. McGautha's record has a
to be desired, and I am being very generous to him,
d you will appreciate my position. But when the widow
lked the coffin, ladies and gentlemen of the jury, and
ask you to consider, and I ask you please not to put
e man in the gas chamber that didn't pull that trigger,
d let me be just as decent as I know how to be. I
g you on behalf of both defendants. I beg you on
half of both defendants, please don't put them in the
s chamber. But I beg you, if you adopt Miss Obera's
ggestion, the man that killed Mr. Smetana, I beg you
that basis, please don't put Mr. McGautha in the gas
amber, because when the widow looked, it wasn't Mr.
cGautha in the chamber, and the people at the funeral
ere not in error. Mr. McGautha is a bad man, and if
ey said something good about him, you wouldn't recog-
ze him by that, but I am concerned that we get the
ght man, and even Miss Obera had some concern.
I ask you to look at both men. I ask you to look at
r. Wilkerson and Mr. McGautha. Miss Obera believes

that Mr. Wilkerson struck Mrs. Smetana with a gun. Mr. Wilkerson has not been entirely honest, nor has Mr. McGautha; Mr. McGautha with respect to whether or not the police officer had seen a certain type of gun, but [fol. 655] what happened in that market, I wonder if Mr. Wilkerson has been very honest. He told the police that he left the market first. He told you under oath just the opposite, ladies and gentlemen of the jury. So we are concerned about what man are we talking about that pulled the trigger of that gun.

[fol. 656] "All right. Who was holding a gun at that time that you saw?

"A In the black suit, he was holding all the gun.

"All right. After the shot was fired, did you notice whether the man in the black suit, Mr. Wilkerson, still had a gun?

"He was still holding the gun. Then—"

She was interrupted.

"All right. Just a minute. Excuse me. Was there any smoke coming from that gun?

"I didn't see it."

Was Mrs. Smetana that excited? Mrs. Smetana told you when she didn't understand something, but she also told you when she did see something, and she said she saw the gun in the hand of the man with the black suit. If you tell the story based on past record, it is McGautha. At the funeral it is McGautha. But that has a limit, too, ladies and gentlemen of the jury. Who really pulled that trigger? Who really pulled that trigger?

"All right. Just a minute. Excuse me. Was there any smoke coming from the gun?"

I am backing up repeating that question.

[fol. 657] "I didn't see it.

"What was he doing with the gun? How was he holding it?

"How he was holding it, like this.

"Was he pointing it at anyone?

"Yes.

"At who was he pointing it?

"Before he was pointing to me. Then he was pointing to my husband later.

"At the time you heard the shot"—

She is being examined by Miss Obera at this time.

"At the time you heard the shot, and then you saw Mr. Wilkerson with the gun, was Mr. Wilkerson pointing the gun at anybody?

"I don't know by the name. Who is Wilkerson?

"The one in the black suit.

"A He was pointing to my husband, the gun.

"After you heard the shot, did you see your husband fall?

"Yes.

"Did he get up again?

"No.

[fol. 658] "Did you notice the man in the green shirt, Mr. McGautha, about that time?

"Yeah, I saw him.

"Was he still holding a customer?

"A Yes.

"Did he have anything in his hand?

"I didn't—he hold the gun to the customer.

"Did you see him hold the gun to the customer?

"A He was in the back of the counter.

"So you just saw his back?

"A Yeah.

"Think for a moment about the time you heard the shot. You noticed that Mr. Wilkerson had a gun; is that right?

"Yes. He got the—

"All right. Did you see Mr. McGautha, the man in the green shirt, at that time, right after the shot?

"I saw him, yes.

[fol. 659] "Did he have his back to you at that time?

"Yes.

"Then how long did the man stay in the store?

"A Which store?

"Q The two men.

"A When everything—when they shot?

"Q Yes.

"A And then maybe a second later, he said, 'Now, let's go.'

"Who said, 'Now, let's go'?

"In the black suit.

"Did you hear the other man say anything?

"A No, he didn't say anything.

"Did the other man leave?"

Then I interrupted.

"Your Honor, I am sorry. The man in the black suit said what? I am sorry.

"THE COURT: The answer was he didn't say anything.

"MR. LLOYD: That's—

"THE COURT: Excuse me. I am sorry. I misstated the testimony. Would you read the answer, please.

[fol. 660] "(Record read.)

"MISS OBERA: Your Honor, I have another photograph. May it be marked People's 11 for identification?"

Now, I want to go to another section where I cross-examined her again on recross.

"Pardon me, ma'am. Are you absolutely sure this is the man?"

And you recall I stood behind Mr. Wilkerson. I put my hand on his shoulder, and I beg you again, in all fairness—I don't care how despicable, no good, they are, and there is a lot of merit for that position, they are entitled to have their penalty determined with the true facts in mind as to what each party did.

I will start all over again reading.

"Pardon me, ma'am. Are you absolutely sure this is the man?

"A Yes.

"That struck you with a gun?

"A Yes.

"You are positive?

"Yes.

"And are you positive this is the man that was holding People's 3 for identification in his hand? Are you sure?

"Yes.

[fol. 661] "You are sure he is the one?

"He is the one, yes.

"Now, when you say, 'He is the one,' you are talking about the tall one who is in the black suit today; is that right?

"A Yes.

"And you are positive of that?

"Yes.

"And were you positive about that at the preliminary hearing?

"Yes.

"And are you positive the other man was holding on to a customer in the store?

"Yes.

"There is no doubt about that; is that correct?

"A He was holding the customer, yes.

"And is there any doubt in your mind at all that this is the man saying, 'Now, let's go' after you heard the shot?

"Yes.

"Is this the one?

[fol. 662] "Yes.

"You are sure about that?

"Yes.

"Who asked for the money, Mrs. Smetana, the money that was given?

"He, the black suit.

"The black suit?

"Yes."

[fol. 663] This is a very small world, ladies and gentlemen of the jury. Mr. Wilkerson and I were born approximately 25 miles apart in Mississippi.

Mr. Wilkerson undoubtedly has had it rough, but I beg you, please, I beg you very honestly, I beg you, please, don't put Mr. Wilkerson in the gas chamber because I don't think his record deserves it. I don't think his record deserves it.

I think the evidence indicates without equivocation, that it is not good, as my client, Dennis Councle McGautha is not good. He is the scum of the earth. He has been in and out of trouble all of his life.

I beg you, please, the evidence does not indicate he pulled the trigger to kill Mr. Benjamin Smetana.

Please, ladies and gentlemen of the jury, it doesn't indicate that.

On the witness stand, on the witness stand when Mr. Wilkerson was on the witness stand, he wanted you to believe that he had gone out of that store at a time different when he did. He was the one with People's 3 for Identification. Those two guns, as between People's 3 and People's 5, forget the guns, forget the guns.

How can any fair and impartial person say that you could mistake Dennis McGautha, as black as he is, with Mr. Wilkerson, as light as he is.

[fol. 664] Now, with respect to the smoke coming from that gun. She said she didn't see it. That is an honest thing, but I also heard the ballistics expert say with respect to the lighting, you might not see it.

I beg you, please, ladies and gentlemen of the jury, the McGautha type standard cannot be applied in a court of law, and I beg you very seriously, I beg you very honestly, I beg you please, please, because I believe there is some utility in life itself, whether it is imprisonment —and I'd be the first to say Dennis Councle McGautha should spend every day, every breath that he draws should be in the confines of a prison, but I beg you, please. Now, I join Mr. Bornstein in saying that with respect to whether or not one will die and one will live, both men are entitled to an individual verdict on your part, and I beg you, ladies and gentlemen, I'm sure Mr. Wilkerson is the kind of man as the picture was painted, but when the widow looked in the coffin, when the widow looked for sure someone else struck her with that gun and I don't think there is any doubt in anybody's mind but the same person that struck her with that gun killed her husband.

Now, another point. Mr. Wilkinson on the stand yesterday on cross-examination by Miss Obera, he indicated

he had the gun out. He also indicated he was left-handed. [fol. 665] I'd like for you to know when he was showing you with what hand he was holding the customer with and what hand he was holding the gun with he was holding the gun with his right hand, and it was a spontaneous reaction.

If you didn't see it, disregard it, but I submit to you that it is true. That Miss Obera asked the question again about it and this did happen.

Mr. Wilkerson struck Mrs. Smetana.

You can't mistake then, ladies and gentlemen of the jury, those two, not those two.

You hear things, "They all look alike," not these two. They don't look alike, not in anybody's book.

When you were being asked questions on voir dire relative to the death penalty, I wanted to make sure on behalf of the People we had a jury that could vote the death penalty in a proper case, but certainly it would have been unfair to both the defendants if we had a jury that could only vote the death penalty.

I am willing to leave it up to you, ladies and gentlemen of the jury, but I ask you to please, I beg you, keeping in mind that doesn't make any difference, you could kill both of them legally, there is no doubt about it, morally you could do it, it is left up to you legally and morally, you can do it, but I am begging you for mercy.

I am begging you, ladies and gentlemen, with fervor. [fol. 666] I am just as sincere, I don't believe society is going to be credited.

Now, Miss Obera, I'm sure, didn't mean, and I am sure she will stand corrected with respect to the murder, I am not trying to minimize anything in the background of Dennis Councle McGautha, attempting to minimize his past life.

It is bad. It is putrid, and he is a liar. Mr. McGautha told his lies. Mr. Wilkinson told his share of lies on the stand when he was making a clean breast of what he told to the police. Meeting the girl at the bus stop, they both supported it.

All I am trying to say is this: Please try to put the case in the proper perspective and please, please, spare their lives. I beg you, please.

You say what about Mr. Smetana? That wouldn't be a fair exchange anyway. This man was working in a market trying to support his family. It is not a fair exchange. It is not a fair exchange, but I beg you, please, for their lives.

"Vengeance is mine, sayeth the Lord," and we all know far more about mercy, about love, about understanding, and when I say understanding, I don't mean—it doesn't excuse, it doesn't excuse anything. It doesn't excuse a thing.

I beg you, please, on behalf of both of these men, please [fol. 667] spare their lives, and I submit to you very honestly, very sincerely, no one was mixing Mrs. Smetana up when they asked her if she was sure about who had done what.

I beg you, please, I join with Mr. Bornstein in everything that he said.

I want to take this opportunity to thank Miss Obera and Mr. Bornstein and I want to thank you for your attention, ladies and gentlemen of the jury.

I hope that you will see fit to spare the lives of both men.

Thank you very much.

THE COURT: Thank you, Mr. Lloyd.

Ladies and gentlemen of the jury, we are going to take our noon recess at this time.

Please bear in mind the admonition that I have given to you. It is still applicable, of course.

It is, once again, that you are not to suffer yourselves to be addressed by any person on any subject matter of this trial either directly or indirectly.

You are not to converse among yourselves about this case and you are not to form or express any opinion on this matter until it has finally been submitted to you.

We will be in recess now until 2:00 o'clock this afternoon.

2:00 'clock this afternoon I will instruct you on the [fol. 668] law that is applicable to this phase of the case and the case will be given to you for your deliberations.

Be back here at 2:00 o'clock.

(Whereupon, a recess was taken in this matter at 11:52 until 2:00 o'clock p.m. of the same day.)

——oOo——

[fol. 669] (Whereupon, at 2:07 p.m. the following proceedings were had:)

THE COURT: All right, this case of People vs. McGautha, I will have the record reflect the appearance of both defendants. The record should further reflect the appearance of all counsel, and the jury in their respective places in the jury box.

INSTRUCTIONS GIVEN

No. 1

Ladies and gentlemen of the jury: It now becomes my duty to instruct you in the law that applies to this phase of the trial and it is your duty to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

Now, both the People and the defendants have a right to demand, and they do demand and expect, that you will conscientiously and reasonably consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

[fol. 670] At the first phase of the trial you were given instructions concerning the law applicable to this case. It will not be necessary to repeat at this time those instructions. With one notable exception those instructions are applicable to this phase of the trial as well and you are to be guided by them. The exception is that in this part of the trial the law does not forbid you from being

influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case; however, the law does forbid you from being governed by mere conjecture, prejudice, public opinion or public feeling.

The defendants in this case have been found guilty of the offense of murder in the first degree, and it is now your duty to determine which of the penalties provided by law should be imposed on each defendant for that offense. Now, in arriving at this determination you should consider all of the evidence received here in court presented by the People and defendants throughout the trial before this jury. You may also consider all of the evidence of the circumstances surrounding the crime, of each defendant's background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court. However, it is not essential to your decision that you find mitigating circumstances [fol. 671] on the one hand or evidence in aggravation of the offense on the other hand.

Evidence of other crimes alleged to have been committed by a defendant may not be considered as evidence in aggravation unless proved beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, that such other crimes have been committed by a defendant.

It is the law of this state that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury. If you should fix the penalty as confinement for life, you will so indicate in your verdict. If you should fix the penalty as death, you will so indicate in your verdict. Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment

shall be inflicted, you are entirely free to act according to your own judgment, consicence, and absolute discretion. That verdict must express the individual opinion of each juror.

[fol. 672] Now, beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury. In the determination of that matter, if the jury does agree, it must be unanimous as to which of the two penalties is imposed.

In this case you must decide separately the question of the penalty of each of the two defendants. If you cannot agree upon the penalty to be inflicted on both defendants, but do agree as to the penalty of one of them, you must render a verdict as to the one on which you do agree.

You shall now retire to the jury room. As I have indicated, in order to return a verdict it is necessary that all twelve of the jurors agree to the decision. As soon as all of you have agreed upon a verdict, you shall have it signed and dated by your foreman and then return with it to this room.

Requested by People	( )
Requested by Defendant	( )
Given as Modified	( )
Given on Court's Motion	(X)

Swear the bailiff, please.

(Whereupon, the clerk of the court duly administered to the bailiff the oath regarding taking charge of the [fol. 673] jury during its deliberations.)

THE COURT: Swear the bailiff, also, as to the two alternate jurors.

(Whereupon the clerk of the court duly administered to the bailiff the oath regarding taking charge of the two alternate jurors during the deliberations.)

(Whereupon, at 2:12 p.m. the jury commenced its deliberations.)

(Whereupon, at 3:55 p.m., the jury returns to the courtroom and the following proceedings were had:)

THE COURT: All right, this case of People vs. McGautha and Wilkinson, I will have the record reflect the appearance in court of both defendants, all counsel, and the jury in their respective places in the jury box.

Mr. Foreman, I have received a note from you handed to me by the bailiff, and in the note which I will read into the record at this time, you have written as follows:

"A note from instructions. 'Confinement in the state prison for life.' Does this mean that there is no possibility of parole?"

And the second question is, "Can we have a copy of the transcript in the jury room?"

I will answer the second question first. The answer to that question is, no, that you may not.

However, we have at any time the facilities of this [fol. 674] court for you and if at any time during your deliberations you would like to have any of the testimony reread, that will be done here in the courtroom at your request.

We will have the court reporter reread any or all of the testimony that you deem it important to hear during the course of your deliberations.

Now, as far as the first question is concerned, I am going to give to you another jury instruction at this time, which you are to follow with all the others.

INSTRUCTION GIVEN

No. 2

A sentence of life imprisonment means that the prisoner may be paroled at some time during his lifetime or that he may spend the remainder of his natural life in prison. An agency known as the Adult Authority is empowered by statute to determine if and when a prisoner is to be paroled, and under the statute no prisoner

can be paroled unless the Adult Authority is of the opinion that the prisoner when released will assume a proper place in society and that his release is not contrary to the welfare of society. A prisoner released on parole may remain on parole for the balance of his life and if he violates the terms of the parole he may be returned to [fol. 675] prison to serve the life sentence.

So that you will have no misunderstandings relating to a sentence of life imprisonment, you have been informed as to the general scheme of our parole system. You are now instructed, however, that the matter of parole is not to be considered by you in determining the punishment for either defendant, and you may not speculate as to if, or when, parole would or would not be granted. It is not your function to decide now whether these men will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether these men shall suffer the death penalty or whether they shall be permitted to remain alive. If upon consideration of the evidence you believe that life imprisonment is the proper sentence, you must assume that those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that they will not parole a defendant unless he can be safely released into society. It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Adult Authority will properly carry out its responsibilities.

Requested by People	( )
Requested by Defendant	( )
Given as Modified	( )
Given on Court's Motion	(X)

In response to the second question, is there any portion [fol. 676] of the transcript that you could tell me at this time the jury desires to have read?

THE FOREMAN: Yes, sir. We'd like to have the testimony of Mrs. Smetana read. Her complete testimony.

THE COURT: All right.

(Whereupon, the reporter reads to the jury from the daily transcript the complete and full testimony of Lola Smetana.)

THE COURT: The hour now being ten minutes after 5:00, I ask that you now return to the jury deliberation room.

Yes, Mr. Foreman?

THE FOREMAN: We have one more section we'd like to hear in Irma Gean's testimony.

Is that possible at this time?

THE COURT: The hour now being—

THE FOREMAN: It is only a small portion of the testimony, if it can be found.

THE COURT: Well, as far as you are concerend, the hour now being ten minutes after 5:00, obviously, you are in no position to do any further deliberating.

I'm sorry I am going to have to curtail your freedom at this time and you are not permitted, of course, to go home at this time.

We will make arrangements to have the bailiff house you for the evening and feed you, and then you can have [fol. 677] all the time that you need for deliberations.

I think the hour being such as it is it may be better if we would reconvene here tomorrow morning at 9:00 o'clock and at that point we can have that portion of the testimony reread.

As I have indicated to you, at any time that you want any of the testimony read, or reread, or re-reread, we will certainly do so.

The portion that you want read is what, again?

THE FOREMAN: It is a section by Irma Gean as to who had what in their hands when they returned to the car after the robbery in Mr. Smetana's market.

THE COURT: We will have the reporter in this matter search the transcript so we can have that prepared for you and read to you tomorrow morning at the outset of your deliberations.

See you here tomorrow morning.

(Whereupon, an adjournment was taken until Friday, August 25, 1967, at 9:00 a.m.)

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[fol. 678] LOS ANGELES, CALIFORNIA,
FRIDAY, AUGUST 25, 1967, 9:00 A.M.

——oOo——

(Jury returns to deliberate at 9:00 a.m.)

THE COURT: All right, this case of People vs. McGautha and Wilkinson, can we have the defendants and the jury out, Dave.

(Whereupon, a matter not relating to this case was handled on the Court's calendar.)

(Whereupon, the jury and the defendants were brought into the courtroom.)

MR. BORNSTEIN: Your Honor, I discussed with the Court last night that I have to be out of town today for a short period of time. I am going to fly down and fly back and I would ask that Mr. Broady sit in for me while the testimony is reread and he will make other arrangements in the event that he is not here.

I have given the information to the clerk.

THE COURT: Mr. Wilkinson, have you talked to your attorney, Mr. Bornstein, about his other commitments and other trial departments in this state today?

DEFENDANT WILKINSON: Yes.

THE COURT: Is it agreeable with you, for the limited purposes, then, of having the testimony reread, that Mr. Broady can substitute in place and instead of your attorney, Mr. Bornstein, at this time?

DEFENDANT WILKINSON: Yes.

[fol. 679] THE COURT: All right, permission is granted, then, Mr. Bornstein, for you being relieved to attend court in San Diego.

MR. BORNSTEIN: Yes, your Honor.

THE COURT: Mr. Broady, will be attorney of record at this time for this limited purpose.

I will have the record reflect the appearance of both defendants, all counsel, and the jury in their respective places in the jury box.

Good morning, ladies and gentlemen.

MR. LLOYD: Pardon me, your Honor. May I approach the Bench, please, with counsel, relative to the testimony that is going to be read back?

(Whereupon, the following proceedings were had at the Bench outside of the hearing of the jury:)

MR. LLOYD: I don't have any particular suggestion, but I might indicate what they want read back occurs in several portions of the transcript and I was just wondering if there was some agreement as to how it should be done.

THE COURT: Well, as I understand it, in going over the transcript, that the reference to the items that they have in mind appear in about fifteen places throughout the transcript, so it would appear to me, unless I hear an objection from counsel, that we will have the reporter read the entire testimony of this witness, both [fol. 680] direct and cross.

MR. LLOYD: Right.

MISS OBERA: Thank you.

MR. BORNSTEIN: And I would also point out, if I may, your Honor, that there was a hiatus in her testimony, so that it should all be read. I don't know if the Court remembers, but there was an occasion of having her step down for a few minutes and then she came back.

THE COURT: Yes.

MR. BORNSTEIN: It appears in two parts in the transcript.

THE COURT: All right.

(The following proceedings were held in open court within the hearing of the jury:)

THE COURT: Ladies and gentlemen of the jury, a rereading of the testimony of the witness, Irma Gean Dupree, indicates that the entire testimony should be reread to the jury at this time.

We feel that we could not pick out the various items that you have mentioned one by one and take them out of context, so I will ask at this time the reporter will reread the entire testimony of this witness, both direct and cross.

Was there any other testimony, now, the jury wanted reread?

THE FOREMAN: Yes, sir. Yesterday we heard Mrs. [fol. 681] Smetana's testimony reread to us and there came up another question concerning one statement she made and we'd like to have that particular portion reread to us so that we may better know what it referred to, and it was a statement where she said she couldn't tell if the person, or identity of the man was black or white, and we are not sure just what she meant by black or white, color of dress, or color of skin, and we'd like to have that particular paragraph reread to us.

THE COURT: All right, after we conclude this reading we will see if we can find that particular paragraph of her testimony.

(Whereupon, the reporter read the complete and full testimony for the daily transcript of Irma Gean Dupree.)

THE COURT: Mr. Hamblin, once again, the other statement about Mrs. Smetana that you made reference to?

THE FOREMAN: Yes, in her testimony she said she couldn't tell if it was black or white, words to that effect, and we want it clarified that she made a reference to once in her testimony.

THE COURT: That may take some time to find, and we—I will ask at this time that you return to the jury deliberation room and continue deliberations and I will ask the reporter, with the assistance of counsel, to search the transcript and see if we can find that reference in [fol. 682] her testimony, and as soon as we can find it, if it can be found, we will call you back out and have that portion reread to you.

THE FOREMAN: Thank you.

(Whereupon, the jury returned to their deliberations.)

(The jury returns to the courtroom at 2:45 p.m. and the following proceedings were had:)

THE COURT: All right, this case of McGautha and Wilkinson, I will have the record reflect the appearance of both defendants, the presence of all counsel, and the jury in their respective places in the jury box.

Ladies and gentlemen of the jury, this morning we had some discussion, Mr. Hamblin, you and I, about some other testimony that you wanted reread; the testimony of Mrs. Smetana.

I have had the court reporter, and with the assistance of counsel, search the transcript of the specific reference that you made to me.

That cannot be found. We have found two references in the transcript that I will ask at this time that Miss Smith reread to you, rather than reread the entire testimony, again, of Mrs. Smetana. Unless you find that to be necessary, I will not do that, but the specific reference that you made to the Court is not, as far as our search of this transcript, in her testimony, but there are two [fol. 683] pages that may have been what you referred to.

(Whereupon, the reporter reread two pages of the testimony of Mrs. Lola Smetana from the daily transcript.)

THE COURT: With the rereading, then, of those two pages, and, as I have indicated to you, a search of the record discloses that may have been what you had reference to, although not specifically as you stated it to the Court, I'd ask at this time that you return to the deliberation room and continue with your deliberations in this matter.

(Whereupon, the jury returned to their deliberations.)

(The jury returns to the courtroom at 3:35 p.m. and the following proceedings were had:)

THE COURT: All right, this case of People vs. McGautha and Wilkinson, I will have the record reflect the appearance of the defendants, and each of them, all counsel, and the jury in their respective places in the jury box.

Mr. Hamblin, I have your note in which you indicate as follows:

"May we hear the testimony of John Watkins and Eddie Rupert?"

THE FOREMAN: Yes, sir.

THE COURT: I will ask at this time that Miss Smith, please, read to the jury, now, the testimony of those two witnesses.

[fol. 684] (Whereupon, the complete and full testimony of John Watkins and Eddie Rupert were read by the reporter from the daily transcript.)

THE COURT: All right, ladies and gentlemen of the jury, with that rereading of the testimony you will again return to the jury deliberation room and continue with your deliberations.

(Whereupon, the jury returned to their deliberations.)

(The jury returns to the courtroom at 4:45 p.m. and the following proceedings were had:)

THE COURT: All right, this case of McGautha and Wilkinson, I will have the record again reflect the appearance of the defendants, and both of them, all counsel, and the jury in their respective places in the jury box.

Mr. Hamblin, have you arrived at your verdicts in this case?

THE FOREMAN: After much sincere deliberation, we have, your Honor.

THE COURT: Would you hand them, please, to the bailiff.

(The foreman complies and the bailiff in turn hands the verdicts to the Court.)

THE COURT: Mr. Williams will read the verdicts, please.

THE CLERK: Title of Court and Cause: "We the [fol. 685] jury in the above-entitled action, having found the defendant, Dennis Councle McGautha, guilty of mur-

der, in violation of Section 187 Penal Code, a felony, and having found it to be murder in the first degree, as charged in Count III of the Information, now fix the penalty for said offense at death. This 25th day of August, 1967. Mr. Allen A. Hamblin, Foreman."

Title of Court and Cause: "We the jury in the above-entitled action, having found the defendant, William Rodney Wilkinson, guilty of murder, in violation of Section 187 Penal Code, a felony, and having found it to be murder in the first degree, as charged in Count III of the Information, now fix the penalty for said offense at life imprisonment. This 25th day of August, 1967. Allen A. Hamblin, Foreman."

THE COURT: Would you poll the jury, please.

First poll the jury as to the verdict rendered by the jury as to defendant McGautha.

As your name is read, ladies and gentlemen of the jury, if this is your verdict as to defendant McGautha, I want you to answer yes. If it is not your verdict, answer no.

THE CLERK: Mrs. Walker.
JUROR WALKER: Yes.
THE CLERK: Mrs. Barden.
JUROR BARDEN: Yes.
[fol. 686] THE CLERK: Mrs. Braun.
JUROR BRAUN: Yes.
THE CLERK: Mrs. Grant.
JUROR GRANT: Yes.
THE CLERK: Mrs. Kischell.
JUROR KISCHELL: Yes.
THE CLERK: Mr. Haskell.
JUROR HASKELL: Yes.
THE CLERK: Mrs. Janssen.
JUROR JANSSEN: Yes.
THE CLERK: Mrs. Wain.
JUROR WAIN: Yes.
THE CLERK: Mrs. Fogel.
JUROR FOGEL: Yes.
THE CLERK: Mr. Hamblin.
JUROR HAMBLIN: Yes.

THE CLERK: Mr. Perez.
JUROR PEREZ: Yes.
THE CLERK: Mr. Thomas.
JUROR THOMAS: Yes.
THE COURT: Would you poll the jury now as far as the verdict rendered in the case of People vs. Wilkinson.

Once again, as your name is called, if this is your verdict would you answer yes. If it is not your verdict would you answer no.

THE CLERK: Mrs. Walker.
[fol. 687] JUROR WALKER: Yes.
THE CLERK: Mrs. Barden.
JUROR BARDEN: Yes.
THE CLERK: Mrs. Braun.
JUROR BRAUN: Yes.
THE CLERK: Mrs. Grant.
JUROR GRANT: Yes.
THE CLERK: Mrs. Kischell.
JUROR KISCHELL: Yes.
THE CLERK: Mr. Haskell.
JUROR HASKELL: Yes.
THE CLERK: Mrs. Janssen.
JUROR JANSSEN: Yes.
THE CLERK: Mrs. Wain.
JUROR WAIN: Yes.
THE CLERK: Mrs. Fogel.
JUROR FOGEL: Yes.
THE CLERK: Mr. Hamblin.
JUROR HAMBLIN: Yes.
THE CLERK: Mr. Perez.
JUROR PEREZ: Yes.
THE CLERK: Mr. Thomas.
JUROR THOMAS: Yes.
THE COURT: Unanimous and will be so recorded as to each defendant.

Ladies and gentlemen of the jury, that now completes [fol. 688] your service on this case. That includes the twelve of you who have returned the verdicts in this case and it also includes the two alternate jurors who have been impaneled in this matter.

The information that I have is that they want all of you to report to the jury assembly room this coming Wednesday, which is the 30th day of August, at 9:00 o'clock in the morning, and that will be the jury assembly room in the courthouse.

On behalf of all of us here in court I want to thank you for your service that you have rendered in this case.

As I have indicated to you earlier in the course of the voir dire examination, I know of no more difficult task that you are called upon to perform in this type of a case.

Your efforts in this matter are sincerely appreciated and I thank you for them.

The admonition previously given to you is now at this point lifted. You are free at this point to discuss this case. However, that is your own personal option. If you want to talk about the case, you may. If you do not want to talk about the case, you are under no obligation to do so.

Once again, I thank you and you are now excused.

[fol. 689] (Whereupon, the jury leaves the courtroom.)

THE COURT: Do People waive reading of the verdict as recorded?

MISS OBERA: So waived, your Honor.

THE COURT: Does defendant McGautha waive reading of the verdict as recorded?

MR. LLOYD: Yes, your Honor.

THE COURT: Does defendant Wilkinson waive reading of the verdict as recorded?

MR. BROADY: Yes, your Honor.

THE COURT: I am going to set this matter down for judgment and sentence in this court three weeks from today. Today is the 25th day of August. Three weeks from today will be the 15th day of September. That will be at 9:00 o'clock in the morning in this department.

I will remand both defendants to the custody of the Sheriff pending that procedure.

The jury having reached a verdict in this case that they have, of course, neither defendant is eligible for probation. However, I will order, nonetheless, a proba-

tion report as to each defendant. It will be of assistance to the Court at the time sentence is imposed in this matter.

9:00 o'clock, the 15th of September.

MR. LLOYD: Thank you, your Honor.

(Whereupon, proceedings in this matter were adjourned until Friday, September 15, 1967, at 9:00 a.m.)

[fol. 690] LOS ANGELES, CALIFORNIA,
FRIDAY, SEPTEMBER 15, 1967, 9:30 A.M.

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THE COURT: This case of People vs. William Rodney Wilkinson.

MR. BORNSTEIN: If the Court pleases, Alfred Bornstein, present and appearing for the defendant. The defendant is present in court.

THE COURT: I will have the record reflect the appearance of the defendant William Rodney Wilkinson, represented by his attorney, Mr. Bornstein.

This matter is calendared in this department at this time for judgment and sentence of the Court.

The matter was referred by this Court to the Probation Department pursuant to Section 1203 of the Penal Code for the purpose of obtaining a probation report to advise the Court for the purpose of judgment and sentence in this matter.

The matter is calendared this date for that purpose, along with a motion for a new trial.

Does counsel waive formal arraignment for judgment and sentence in this matter?

MR. BORNSTEIN: So waived, your Honor.

THE COURT: Is there any legal cause why sentence should not now be imposed?

MR. BORNSTEIN: Other than the pending motion for a new trial, none, your Honor.

[fol. 691] THE COURT: All right, I will hear that at this time.

MR. BORNSTEIN: If the Court please, the matter will be submitted at this time.

THE COURT: Without argument?

MR. BORNSTEIN: Without argument, yes, sir.

THE COURT: A motion for a new trial in this matter will be denied.

MR. BORNSTEIN: No legal cause as to why sentence should not now be pronounced.

THE COURT: Anything further you wish to say in this matter, Mr. Bornstein?

MR. BORNSTEIN: Your Honor, there is nothing I can say. The record speaks for itself. There is nothing that can be said as far as the punishment.

I will submit the matter.

THE COURT: All right, Mr. Wilkinson, I will have the record reflect that I have received a nine-page report from the Probation Department. I have read and considered that report.

MR. BORNSTEIN: Well, there is one point, your Honor, with reference to the sentence. I feel that under the law the minor sentence should be merged as far as the punishment because there really can be no effect as to any consecutive type sentences.

THE COURT: That is correct under the law, Mr. [fol. 692] Bornstein.

Mr. Wilkinson, it will be the judgment and sentence of this Court for Count I of the Information, robbery on the 4th day of February, 1967, at which time you were armed with a deadly weapon, that you be sentenced to the state prison for the term prescribed by law.

It will be the further judgment and sentence of this Court as to Counts II and III of the Information, and at this time I will order Counts II and III of the Information merged for the purpose of sentence in light of the fact that the victim in each count was Benjamin Smetana, and in Count II you were convicted by the jury of robbery and of being armed with a deadly weapon at the time, and in Count III the jury found you guilty of murder.

Counts II and III will be merged for the purpose of sentence, and it will be the judgment and sentence of this

Court that you be imprisoned in the state prison for the balance of your life.

The sentence in Count I, and the sentence on the merged counts, II and III, do and will and are now ordered as a matter of law to run concurrently.

MR. BORNSTEIN: Thank you, your Honor.

THE COURT: Thank you, Mr. Bornstein.

MR. BORNSTEIN: Your Honor, Mr. Wilkinson has asked me and he has filed a pro per motion on appeal on [fol. 693] his behalf and it is presently before the Court.

May it be made a part of the record?

THE COURT: Yes, it will be made a part of the record.

MR. BORNSTEIN: Thank you.

(Later on the calendar the following proceedings were had:)

THE COURT: All right, this case of Dennis Councle McGautha, I will have the record reflect the appearance of the defendant, represented by his attorney, Mr. Lloyd.

Mr. McGautha, your matter is in this court at this time for judgment and sentence.

The jury having returned in your case their verdict in this matter I calendar the matter in this department this date.

Although you are not eligible for probation, it was still the feeling of the Court that I would like to obtain a probation report.

I, therefore, put your matter down twenty-one days from the date of the verdict in this matter and requested the probation report.

I now have from the Probation Department a report in which it indicates that the probation officer, due to the vast workload, that he has been unable to interview you and he is requesting that this matter be continued until the 29th day of September, 1967.

[fol. 694] He indicates in the report that additional time is needed to complete the investigation.

Mr. Lloyd, is there any objection if I put this matter over to the 29th day of September so that the Probation

Department can complete their investigation in this matter?

MR. LLOYD: No, your Honor.

THE COURT: All right, the matter will then be continued for that reason until the 29th day of September. That is two weeks from Friday, the 29th day of September.

Now, Mr. McGautha, the Court has the right to have this matter continued not more than ten days from today for the purpose of having the Probation Department complete its report.

Now, I can certainly order this report completed prior, or before the 29th day of September, which is Friday.

Your attorney has indicated that he has no objection that this matter be continued until the 29th day of September.

Do you have an objection?

DEFENDANT McGAUTHA: No.

THE COURT: You understand, Mr. McGautha, that you would have the right to have this matter determined by the Court and judgment and sentence imposed by this [fol. 695] Court not more than ten days from today, and that by putting this matter down on the 29th day of September, I am going beyond the statutory period of time; do you understand that?

DEFENDANT McGAUTHA: Yes.

THE COURT: And you will waive your right to an earlier hearing in this matter and personally agree to a hearing and imposition of judgment and sentence in this matter on the 29th day of September; is that correct?

DEFENDANT McGAUTHA: Yes.

THE COURT: Does counsel join in the waiver?

MR. LLOYD: Yes, I do.

THE COURT: Do People join?

MISS OBERA: People join in the waiver.

MR. LLOYD: Thank you, your Honor.

THE COURT: Thank you, Mr. Lloyd.

(Whereupon, the matter was continued to Friday, September 29, 1967, at 9:00 a.m.)

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[fol. 696]

LOS ANGELES, CALIFORNIA

SEPTEMBER 29, 1967 10:30 a.m.

THE COURT: All right. This case of Dennis Councle McGautha.

Step around here, Mr. McGautha, please.

MR. LLOYD: Yes, your Honor.

THE COURT: I will have the record reflect the presence of the defendant represented by counsel, Mr. Lloyd.

This matter is calendared in this court this date for judgment and sentence and also at this time on a motion for a new trial.

I will hear from you first at this time, Mr. Lloyd, on your motion for new trial.

MR. LLOYD: At this time I respectfully request a motion for new trial be granted in this matter on all the statutory grounds.

In particular, I invite the Court's attention to Section 1181 of the Penal Code, Subsection 5, and direct attention to the penalty phase of this trial wherein the prosecution raised the question to the jury, "Ask yourselves why should they live?" I submit to the Court that this is going back to a time in California where the Court held that unless there were ameliorating circumstances, then the jury's verdict should have been death, rather than the law being as it is now, that it is the sole and absolute discretion of the jury as to the penalty in a case. I sub-
[fol. 697] mit to the Court that when you have a quasi-judicial officer with the dignity of the District Attorney's Office, that this is very prejudicial to the free deliberation of the jury.

I am more concerned, your Honor, with asking the Court—and the Court does have the authority and the power and the jurisdiction—pursuant to Section 1181 and pursuant to Section 1260 of the Penal Code, to modify the jury's verdict of death in this case.

Now, Mr. McGautha has a horrible record, your Honor, and I submit to the Court that this jury was of the frame of mind that Mr. McGautha did not pull this trigger until

Mr. McGautha's record was brought out during the penalty phase of this trial. His record is very bad.

Now, Mrs. Smetana, I submit, certainly arguably, when pressed she said "Well, I don't know; I'm confused," but Mrs. Smetana testified that Mr. Wilkinson—and I submit to the Court these two individuals could not be mistaken by anyone in the world, McGautha and Wilkinson—Mrs. Smetana did testify that Mr. Wilkinson struck her with that gun. She did testify that shortly before the shot she saw Mr. McGautha with his back to the counter; he was holding the customer. Shortly thereafter, after the shot, "What was he doing when you next saw him?" "He was still holding the customer." And I say to the Court that there is considerable doubt in my own mind—now, I am [fol. 698] mindful, your Honor, that a jury could bring in a verdict of death even if they thought Mr. McGautha did not pull the trigger. I know that. But I would ask the Court to consider that.

I would invite the Court's attention to another factor: "The tall one, the light one, said 'Now, let's go.'" When Mr. Wilkinson was being cross examined during the penalty phase of this trial, I asked him if he had not indicated to the officers that he had left the liquor store first, and he said "No." But I read his statement back from the police officer where he had told him that he left the store first, and I would submit to the Court that the person who said "Now, let's go" was the person that shot Mr. Smetana, and I certainly submit to the Court that the same person that struck Mrs. Smetana with that gun was the same person that pulled that trigger.

The man has a horrible record. There is just no question about it.

If I may digress for a moment and invite the Court's attention to page 12 of the probation officer's report. In the top paragraph there, "A representative of the Robbery Detail reveals that the defendant was positively identified as the trigger man." Who identified him positively as the trigger man in this case? No one. No one. "Robbery Detail." Wilshire Detectives handled this, the Homicide Detail there.

Your Honor, I state to you, as far as the protection of [fol. 699] society is concerned, there is nothing, nothing whatsoever, in my humble, my very trite opinion, to be gained by imposing the death penalty on Mr. McGautha, and I say to the Court and I beg you very honestly to modify this judgment of death and let him go to the State Prison for the term prescribed by law.

The probation officer states that "He is in need of an extensive period of supervision on the State level for the community's protection." It should be for his life, and I don't think with his record, your Honor, there is any doubt at all, as a practical matter, that Mr. McGautha will ever walk this earth as a free man on any type of parole or probation. But, your Honor, I think there is that doubt there as to who pulled that trigger in this case, and I beg you, I beg you very honestly, to set aside the jury's verdict of death in this case.

What is to be gained? Society is protected. The man is locked up. He can't do it any more.

I say to you that the believable evidence in this case would tend to indicate that Mr. McGautha did not shoot Mr. Smetana, nor did Mr. McGautha strike Mrs. Smetana with that gun.

Your Honor, I realize the jury has made their determination. I am certainly not here trying to shift the responsibility back to the Court. I am not trying to do that. That would be unfair, and I am not trying to do it. [fol. 700] Their verdict is that of death. But your Honor does have the authority, and I beg you, for all the reasons indicated, to set aside this verdict of death and modify it to life imprisonment.

That is all, your Honor.

Stand, Mr. McGautha.

THE COURT: Thank you, Mr. Lloyd.

Miss Obera.

MISS OBERA: Your Honor, I would urge the Court to impose the verdict, or the penalty, which the jury returned.

It is true that during the guilt phase of this trial and by reason of Mrs. Smetana's testimony there may have been some doubt as to who pulled the trigger. But I

believe, in looking at the manner in which the jury determined the penalty, that they resolved that doubt against Mr. McGautha, because if the Court will recall, the jury had the testimony of various witnesses reread in its entirety, and when they finally brought their verdict in, it was after they had heard the testimony reread of Mr. John Watkins, I believe his name was, who, if he favored anybody in this case, would undoubtedly have favored the defendant McGautha. Mr. Watkins, after cross examination by Mr. Bornstein, finally indicated—I think it was clear in his testimony—that it was Mr. McGautha who said to him that he had shot the man.

MR. LLOYD: Your Honor, may I be heard? It is [fol. 701] irregular, but—

Your Honor, with respect to Mr. Watkins, I would invite the Court's attention to what we are talking about is what someone said. I wonder if that type of evidence is preferable to the lady who was right there who was concerned with who shot her husband. I don't believe that it is, and I don't believe that Mr. McGautha pulled the trigger, and I don't believe the evidence in this case indicates that Mr. McGautha pulled the trigger.

The jury has made a determination, as Miss Obera said, and it is just a mercy-type plea, your Honor, but I beg you, I beg you, please—the man is suffering now from a severe heart condition. I know you can find something like this about every defendant.

The man has a deplorable record, and I tell you, your Honor, there is no doubt in my mind but when the jury had the benefit of his record, that they then proceeded to say, "Well, he has killed someone once before. As between the two men, he probably pulled the trigger," and I think this flies in the face of the evidence.

Again I will submit the matter, but I beg your Honor and I submit to you it has been said that many, many times by criminologists, by people concerned with correction that a State cannot teach people not to kill by killing, and I ask you not to lend the dignity of this State, not to have Mr. McGautha in a position that he thinks it [fol. 702] was an even exchange, he for Mr. Smetana. Mr. Smetana was a decent citizen, working hard for a living, and taking Mr. McGautha's life even on a ven-

geance theory, it wouldn't be an equalizer. I urge you to place him in State Prison for the time prescribed by law, but please spare his life, your Honor.

THE COURT: Thank you, Mr. Lloyd and Miss Obera.

MR. LLOYD: Submit it, your Honor.

THE COURT: In this case the record will reflect that I have requested, received, and read a 13 page probation report in this matter.

The defendant's application for probation is denied.

Suffice it to say, Mr. Lloyd, I have given this case long and careful thought. I listened to the evidence carefully as it was presented to the jury both at the time of the guilt phase and at the time of the penalty phase. I am satisfied that this was a vicious, unmitigated, unjustified kliling.

This is the second human life that has been lost at the hands of Dennis McGautha, one in Texas and one in California.

It has been said time and time again, and very recently by the Supreme Court, that if the law of this State is to be changed, it is to be changed by the Legislature, by the people.

[fol. 703] There is no question that this Court has the power, and certainly this Court, I do not think, except in most unusual circumstances, is justified in placing the Court's judgment over and above that of the 12 people who have carefuly deliberated upon this case and decided that the proper penalty in this case should not be life imprisonment.

Your motion for a new trial is therefore denied.

Is there any legal cause why judgment should not now be imposed?

MR. LLOYD: None other than that previously indicated, your Honor.

THE COURT: All right. Dennis Councle McGautha, on April 6th, 1967, an information, No. A-219578, was duly filed against you by the District Attorney of Los Angeles County charging said defendant in count I with the crime of robbery, in count II with the crime of robbery, and in count III with the crime of murder, said

offenses having been committed on the 14th day of February, 1967. It was further alleged in counts I and II of said information that at the time of the offenses therein alleged that the defendant was armed with a deadly weapon, to wit, a hand gun. It was further alleged in the said information that before the commission of the offenses set forth, the defendant, Dennis Councle McGautha, suffered four previous convictions of felonies, to wit, theft over $50, in violation of the laws of the [fol. 704] State of Texas, a felony, and that judgment of said court against said defendant in said connection was on or about the 26th day of October, 1943, pronounced and rendered and said defendant served a term of imprisonment therefor in the State Prison; robbery, in violation of the laws of the State of Texas, a felony, and that judgment of said court against said defendant in said connection was on or about the 26th day of October, 1943, pronounced and rendered, and said defendant served a term of imprisonment therefor in the State Prison; murder without malice, a felony, in violation of the laws of the State of Texas, and that judgment of said court against said defendant in said connection was on or about the 23rd day of November, 1948, pronounced and rendered, and said defendant served a term of imprisonment therefor in the State Prison; and robbery by assault, a felony, in violation of the laws of the State of Texas, and the judgment of said court against said defendant in said connection was on or about the 16th day of May, 1952, pronounced and rendered and said defendant served a term of imprisonment therefor in the State Prison; that said former convictions as alleged were charged against said defendant with respect to each of the counts set forth in said information.

This defendant was duly and regularly arraigned in the Superior Court of Los Angeles County on April 6th, 1967, at which time the Public Defender of the County of Los Angeles was appointed to represent him and the [fol. 705] matter was continued for plea to April 12th, 1967.

Thereafter, on April 12, 1967, in the Superior Court of Los Angeles County, the Public Defender of the Coun-

ty of Los Angeles was relieved as counsel, and Mr. Charles E. Lloyd was appointed by the Court as attorney of record to represent you. The defendant, with his counsel present, was duly and regularly arraigned on the charges aforesaid, and duly and regularly entered your plea of not guilty to each count and denied each prior conviction alleged in said information.

Immediately following the entry of the defendant's pleas of not guilty and his denial of each prior conviction alleged, the Court then duly and regularly set the case for trial in Department 117 of the Superior Court of Los Angeles County for the 7th day of June, 1967, at 9:00 a.m.

That thereafter, on June 7, 1967, the cause was duly and regularly called for trial in Department 117 of the Superior Court. On motion of a co-defendant, Fannie Lue Smith, joined in by the defendant Dennis Councle McGautha, then appearing with his counsel, the cause was continued to August 14th, 1967, at 9:00 a.m. in Department 117 of the Superior Court. The defendant, Dennis Councle McGautha, having been advised in open court of his right to an earlier trial, personally waived time.

That thereafter, on August 14, 1967, the cause was duly and regularly called for trial in Department 117 of [fol. 706] the Superior Court of this County. In Department 117 the defendant, Dennis Councle McGautha, was re-arraigned on his four prior convictions of felonies as alleged in said information, and he duly and regularly admitted the truth of each of said prior convictions as set forth in the information; to wit, theft over $50, robbery, murder without malice, and robbery by assault, each a violation of the laws of the State of Texas.

Immediately thereafter, the defendant and his counsel being present, said case came on regularly for trial on the issues raised by the defendant's pleas of not guilty to each offense charged. A jury was duly and regularly impaneled and sworn to try the above-entitled case. The jury, after hearing evidence offered on behalf of the People and the defense as to the issues raised by the defendant's pleas of not guilty and the arguments of counsel

and the Court's instructions of the law applicable to this case, did, on the 22nd day of August, 1967, duly and regularly render its verdict as follows: The defendant, Dennis Councle McGautha, was found guilty of robbery as alleged in count I of the information, the jury further finding it to be robbery in the first degree, and further finding that the defendant was personally armed with a deadly weapon, to wit, a hand gun during the commission of the offense; the defendant, Dennis Councle McGautha, was found guilty of robbery, as alleged in count II of the [fol. 707] information, the jury further finding it to be robbery in the first degree, and further finding that the defendant was personally armed with a deadly weapon, to wit, a hand gun, during the commission of the offense; the defendant, Dennis Councle McGautha, was found guilty of murder, as alleged in count III of the information, the jury further finding it to be murder in the first degree.

The matter was then continued by the Court to August 23, 1967, for trial on the issues of the determination of the penalty to be imposed on the defendant.

That thereafter, before the same Court, on the 23rd day of August, 1967, the defendant and his counsel being present, said cause came on duly and regularly for trial on the issue of the determination of the penalty, as to whether said defendant shall be sentenced to life imprisonment or death. Trial by jury was commenced on August 23rd, 1967, and on August 24th, 1967, the jury having received evidence, heard the arguments of counsel, received the instructions of the Court, after deliberations returned a verdict fixing the penalty at death as to the defendant Dennis Councle McGautha.

Following said verdict, the Court ordered a probation report and set the matter down for sentence on September 15th, 1967, in Department 117 of the Superior Court of this County.

On September 15, 1967, the cause was duly and regu- [fol. 708] larly called for hearing on the motion for a new trial and sentence. The defendant was present, represented by his counsel. The probation officer requested additional time to prepare his report, and upon the de-

fendant's personal waiver of time for sentence, the cause was continued to this date, September 29, 1967.

On September 29, 1967, motions for a new trial and for reduction of the penalty from death to life imprisonment were made by the defendant, Dennis Councle McGautha, through his counsel. Said motion for a new trial duly and regularly came on for hearing, said motion being argued by the attorney for the defendant and having been submitted to the Court for its decision, the Court this date denied that motion.

Said motion for reduction of sentence was then heard, argument made by counsel, and having been submitted to the Court for its decision, the Court denied that motion.

Thereafter, on the 29th day of September, 1967, counsel for the defendant stating that there was no legal cause why sentence should not now be pronounced, and the Court having read and considered the probation report, the Court now imposes the following sentence upon you, Dennis Councle McGautha: It is the judgment and sentence of this Court that for the crime of robbery, in violation of Section 211 of the Penal Code of the State of California, as set forth in count I of the information, [fol. 709] the jury having by their verdict convicted you of this offense and having determined the offense to be robbery of the first degree, it is the judgment of this Court that you be sentenced to the State Prison for the term prescribed by law. Further, for the crime of robbery, in violation of Section 211 of the Penal Code of the State of California, as set forth in count II of said information, the jury having by their verdict convicted you of this offense and having determined the offense to be robbery in the first degree, that offense is here ordered merged with count III as one count for the purpose of sentence. Further, for the offense of murder, as set forth in count III of the information, the jury having found the offense to be murder in the first degree and having determined that you shall suffer the death penalty, it is the judgment and sentence of this Court that you shall suffer the death sentence and that said penalty be inflicted within the walls of the State Penitentiary at

San Quentin, California, in the manner and means prescribed by law at a time to be fixed by this Court in a Warrant of Execution.

You are now remanded to the care, custody, and control of the Sheriff of the County of Los Angeles, and he is ordered to deliver you to the warden of the State Penitentiary at San Quentin, California, within ten days from this date, in the usual course of his duties, for the execution of the sentence imposed on the offense of mur- [fol. 710] der contained in count III of this information of which you have been found guilty, to be held by him pending the final determination of your appeal in this matter, which is automatic, and said sentence is to be executed upon final determination of said appeal, and you are to be held by him during said period of time until the further order of this Court.

It is the further judgment of this Court that the sentences on counts I and III of this information shall and do by law run concurrently.

You are now remanded to the Sheriff of the County of Los Angeles as provided for in this judgment to be delivered by him to the warden of the Penitentiary at San Quentin.

MR. LLOYD: Your Honor, while I am mindful that there is an automatic appeal to the California Supreme Court, at the request of the defendant may the record reflect that I am filing a Notice of Appeal in pro per and I am handing a copy at this time to the clerk of the court?

THE COURT: Yes.

MR. LLOYD: Your Honor, I was appointed pursuant to Section 987a of the Penal Code. I wonder if I might be relieved as attorney of record at this time, your Honor?

THE COURT: Yes. You are relieved as attorney of record, Mr. Lloyd, and thank you for your services in this most difficult case.

MR. LLOYD: Thank you, your Honor.

* * * *

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

Crim. 11860

[Filed Apr. 14, 1969, William I. Sullivan, Clerk.]

THE PEOPLE, PLAINTIFF AND RESPONDENT

v.

DENNIS COUNCLE MCGAUTHA AND WILLIAM RODNEY WILKINSON, DEFENDANTS AND APPELLANTS

The District Attorney of Los Angeles County charged Dennis Councle McGautha, William Rodney Wilkinson, and Fannie Lue Smith by information with two counts of armed robbery (Pen. Code, § 211) and one count of murder in the first degree (Pen. Code, § 187). Defendant McGautha was also charged with four prior felony convictions, all of which he admitted. The trial court granted a severance as to Fannie Lue Smith.

Defendants McGautha and Wilkinson were convicted by a jury of two counts of armed robbery, one committed against Pon Lock and one against Benjamin Smetana. Both defendants were also convicted of first degree murder in the death of Mr. Smetana. The jury fixed McGautha's penalty on the murder count at death, and Wilkinson's penalty on that count at life imprisonment. The trial court merged the murder count against defendant Wilkinson with the second robbery count for sentencing purposes, and ordered that defendant Wilkinson's sentences on the murder count and the first robbery count be served concurrently. Defendant McGautha's penalty having been fixed at death, his appeal to this court is automatic (Pen. Code, § 1239), subd. (b)). On January 18, 1968, we ordered Wilkinson's appeal, then pending before the Court of Appeal, transferred to this court so that it could be heard together with McGautha's automatic appeal.

We point out why we have concluded that the judgments against both defendants should be affirmed.

1. *The Facts*

(a) *The Pon Lock Robbery:* On February 14, 1967, at about 2:30 p.m., two men entered a market at 3772 Market Street in Los Angeles. One of the men asked the owner, Mrs. Pon Lock, for a pint of wine, which she gave him. He then pointed a gun at her and demanded money. At the same time the other man pointed a gun at a customer, Mrs. Jean Lim. After obtaining almost $300 the robbers left. Mrs. Lock chased them but they escaped.

Both defendants were positively identified by Mrs. Lock and Mrs. Lim as the robbers. Mrs. Lock indicated that it was McGautha who confronted her and took the money, while Mrs. Lim testified that Wilkinson had kept her at bay with a gun. Sell Morgan, who lived near the Wall Street market, testified that Wilkinson was one of two men who parked in front of his house in a 1960 white Pontiac. Morgan indicated that a woman had remained in the car while the two men were gone, and that the men returned to the car and drove away immediately before Mrs. Lock emerged from her market shouting that she had been robbed. Byron Shelton, a second-grade student, testified that he had seen Wilkinson in the store with another man on the afternoon of the robbery. Byron stated that after he left he saw the two men run from the store. Although he was unable to identify the second man, Byron did indicate that this person was carrying a bottle of wine when he left the store with Wilkinson.

(b) *The Smetana Robbery:* Mrs. Lola Smetana testified that at 5:30 in the afternoon of February 14, 1967, she was in her store at 2151 Venice Boulevard in Los Angeles with her husband Benjamin and a customer. A woman entered the store, followed shortly by two men who asked for a bottle of wine. One of the men, whom Mrs. Smetana identified as Wilkinson, then pulled a gun and told her not to move. Mrs. Smetana identified McGautha as the other man, and stated that he also had a gun and was holding the arms of the customer across the store from where she and her husband were standing. Wilkinson then struck her on the side of her head and she fell to the floor. She heard a shot and her husband collapsed. She

saw neither smoke nor a flash, and was unable to say which of the two men had shot her husband. Mrs. Smetana was also unable to remember whether the woman who entered immediately prior to the robbery had left before or after the beginning of the offense. Mrs. Smetana indicated some uncertainty as to which defendant had struck her and which defendant had stood further away with the customer. As a result of the shooting, Mr. Smetana died a few hours after the robbery.

Miss Erma Dupree stated that McGautha, Wilkinson, Fannie Lue Smith, and she were good friends. On February 14 all four of them drove Fannie Lue's 1960 white Pontiac to the store on Venice Boulevard. Fannie Lue went into the store, followed by the defendants; Miss Dupree remained in the car. After an unstated period of time Fannie Lue returned to the car, followed hurriedly by the defendants. Miss Dupree did not hear a shot fired inside the market. Upon returning to Fannie Lue's house McGautha stated that he had robbed the market and shot a man. In order to convince Fannie Lue that he had done so he showed her an empty cartridge in the chamber of his gun. According to Miss Dupree, McGautha later explained that Wilkinson had hit a woman and that he, McGautha, had shot the man in question. A few days later, Miss Dupree testified, McGautha discovered a newspaper article about the robbery and killing. He stated that the two men being sought were Wilkinson and himself, but contended that the story exaggerated the amount of money they had obtained from the robbery. On cross-examination by defendant McGautha's counsel, Miss Dupree admitted that she had been promised immunity from prosecution and that at the time of the robery Wilkinson was her boyfriend.

John Watkins testified that he had driven the defendants from Los Angeles to Bakersfield about one week after the robbery. He indicated that during the trip McGautha stated that a man had been killed in order to save Wilkinson's life. Watkins gave inconsistent testimony as to whether McGautha admitted the shooting, but he was cer-

tain that one of the defendants had made such an admission.

Kaye Druley, a police ballistics expert, testified that the bullet that killed Mr. Smetana had been fired from the .38 revolver introduced as People's exhibit No. 3. Miss Dupree testified that McGautha's gun resembled exhibit No. 3, but Mrs. Lock stated that the gun used by Wilkinson resembled the .38 in question. Mr. Druley further indicated that the fatal shot might have been fired from either of the points in the store where Mrs. Smetana stated the robbers were standing when her husband was shot.

(c) *The penalty trial:* At the penalty phase defendant Wilkinson testified in his own behalf. He stated that he had come to California from Mississippi in 1960, and had lived at first with a Baptist minister. During most of the period prior to the robbery he had been gainfully employed and had been sending money to his family in Mississippi. He admitted that he had committed the robberies, but insisted that he had done so only with great reluctance and at McGautha's and Fannie Lue Smith's urging. Wilkinson stated that the only gun he had ever owned was a .32, and that although he had the gun with him at the Smetana store he had never fired it. He contended that, while he was holding the customer, McGautha had hit Mrs. Smetana and shot her husband.

Several character witnesses, including a Baptist minister, testified on Wilkinson's behalf. They stated that he had a good reputation, was not a violent person, and had regularly attended church until he met McGautha and Fannie Lue Smith. Sergeant Richard Sullican testified that after his arrest Wilkinson had cooperated fully with the police and answered all their questions.

McGautha also testified in his own behalf. He stated that he had owned a .38 revolver, but that he had lent it to Wilkinson during the Smetana robbery. He further contended that it was Wilkinson who struck Mrs. Smetana and killed her husband while he, McGautha, was holding the customer. He expressed regret over Mr. Smetana's death. McGautha admitted prior Texas convictions for robbery and manslaughter, but maintained his innocence

of the crimes involved. He denied that he had told Miss Dupree that he had shot anyone.

2. *Defendant McGautha was not denied his right to a fair and impartial jury.*

The trial court excused for cause eight prospective jurors and one prospective alternate juror because of their opposition to the death penalty. Defendant McGautha contends that their exclusion was in violation of the standards set out in Witherspoon v. Illinois (1968) 391 U.S. 510, and thus deprived him of a fair and impartial jury. We conclude, however, that the *Witherspoon* requirements, as interpreted by this court, were met by all nine excused jurors.

Witherspoon holds that a "sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (Witherspoon v. Illinois, supra, 391 U.S. 510, 522.) The court excepted from this ruling only prospective veniremen who "made unmistakenly clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them. . . ." (*Id.*, p. 522 fn. 21.)

Six of the prospective jurors and the excused prospective alternate indicated either that they could conceive of no case in which they would vote for the death penalty, or that they could not vote for the death penalty under any circumstances.[1] Such a statement satifies the requirements of

[1] Those seven prospective jurors testified in part as follows:

(a) "THE COURT: You raised your hand in response to that question and I presume that you then feel that you do entertain a conscientious feeling pertaining to the death penalty; is that correct?

"PROSPECTIVE JUROR FISCHKES: Yes, sir.

[Footnote continued on page 254]

Witherspoon. The exclusion of the two other prospective jurors presents a more complicated problem, since they stated instead that they would not vote for the death penalty in a "proper case." (See Witherspoon v. Illinois, supra, 391 U.S. 510, 516 fn. 9.) Viewing the questioning of the two jurors, however, within "the entire context of the examination and the full setting in which it was con-

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[1] [Continued]

"THE COURT: And that is a conscientious feeling that you are so strong that you feel that under no circumstances in any type of case would you ever vote or render that type of a punishment; is that correct?

"PROSPECTIVE JUROR FISCHKES: Yes, sir, I couldn't give that."

(b) "PROSPECTIVE JUROR SIPORIN: Yes, I am absolutely against capital punishment.

"THE COURT: And this is a conviction that is so strong in your mind that you feel that under no circumstances in any type of case would you ever vote to render that type of penalty.

"PROSPECTIVE JUROR SIPORIN: Absolutely, yes."

(c) "THE COURT: And you feel that under no circumstances in any type of a case could you ever be called upon to so vote for that type of punishment; is that right?

"PROSPECTIVE JUROR McDONALD: That is correct."

(d) "THE COURT: I take it then, Mr. Richards, your conscientious objection to the death penalty is of such a nature that you cannot conceive of any type of case, if called upon to do so, that you could vote for this type of punishment; is that correct?

"PROSPECTIVE JUROR RICHARDS: That is correct."

(e) "THE COURT: Your state of mind is that you entertain a conscientious objection to the death penalty which is so strong that you feel under no circumstances in any type of case could you ever vote that type of penalty?

"PROSPECTIVE JUROR HALE: No."

Since the court excused Mrs. Hale immediately after this "No," she must have indicated by her tone of voice that she meant, "No, not under any circumstances."

(f) "THE COURT: Do you feel under no circumstances could you ever vote that type of penalty in any type of a given case; is that correct?

"PROSPECTIVE JUROR UMSTED: That's correct."

(g) "THE COURT: And that objection to the death penalty is such that in your present frame of mind you could not conceive of any type of a case where you would ever vote for that type of penalty; is that correct?

"PROSPECTIVE ALTERNATE JUROR BROWN: Right."

ducted" (People v. Varnum (1969) 70 A.C. 514, 528), we explain why the exclusion of those jurors appears proper.

After the first 12 veniremen were seated in the jury box, the trial court twice instructed the jury that the law "places in the hands of the jury the question of the proper penalty or punishment to be administered where the finding of the jury is that the murder is murder in the first degree," and that the jury would be required to decide in such a case between the imposition of death and life imprisonment. The court then asked, "Is there anyone now in the jury, any of the twelve of you, that entertains such a feeling to the death penalty that you feel under no circumstances in any type of case could you ever vote and render that type of punishment?" After prospective juror Fischkes had been excused for cause, the court questioned Mrs. Verna Rounsley. "Mrs. Rounsley, you raised your hand as well. PROSPECTIVE JUROR ROUNSLEY: Rounsley. THE COURT: Mrs. Rounsley, is that your feeling as well? PROSPECTIVE JUROR ROUNSLEY: Yes, sir. THE COURT: In other words, you entertain, Mrs. Rounsley, a conscientious feeling pertaining to the death penalty which is in the nature of a conscientious scruple against it to the extent that you feel you could not render that type of a punishment if called upon to do so in a proper case; is that right? PROSPECTIVE JUROR ROUNSLEY: Yes. THE COURT: All right, I will excuse you, then, for cause, Mrs. Rounsley."

Although the court's statement that the penalty was in the hands of the jury may have conveyed to Mrs. Rounsley that the law itself supplies no definition of "a proper case," we need not rely on this point. When the court asked, "Is that your feeling as well," Mrs. Rounsley must have understood the word "that" to refer either to the question asked of all twelve jurors at once, or to the question asked of Miss Fischkes quoted in the margin supra. Since an affirmative answer to either of these very similar questions would have warranted the court's excusing Mrs. Rounsley for cause, the requirements of *Witherspoon*, as explained in *Varnum*, are satisfied.

The exclusion of Mrs. Helen Wilson can similarly be justified by reference to the context of her remarks. The complete *voir dire* of Mrs. Wilson is set out in the margin.[2]

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[2] "BY THE COURT:

"Q Mrs. Wilson, you have been able to hear the proceedings as you sat in the back of the courtroom; is that correct?

"A Yes, sir.

"Q Calling your attention, first, to the nature of this litigation, do you know of any reason why you could not sit on a case of this nature?

"A I don't think I could conscientiously impose the death sentence.

"Q You say that you don't think that you could?

"A I know I couldn't.

"Q Is this based upon a conscientious objection to the death penalty?

"A Yes, sir.

"Q And, then, your present frame of mind, Mrs. Wilson, is such, as I understand it, that you could not conceive of any type of a case, if you were called upon to sit on, where you would impose the death penalty; is that correct?

"A I wouldn't want to sit on that type of a case and I couldn't.

"Q Well, it is a question initially told the other members of the jury, Mrs. Wilson, of a natural reluctance on the part, I think, of any of us to avoid a task such as twelve jurors in a courtroom may be called upon to perform.

"I want you to understand, and everyone else to clearly understand that at this point we know nothing about this case whatsoever. All we know is that the case has been filed, that there are three counts in the Information charging two counts of robbery and one count of murder, but I know as a lawyer, and counsel knows as well, that when the charge is murder there is a possibility that he will get into a second phase of the trial.

"Now, it is an unpleasant thought at best to think that we will have to sit here at one time and make that determination. . .

" . . . . . .

"Now, the other side of its is, as I indicated, that there are people who do entertain a conscientious objection to the death penalty, which is so strong that, for example, it would preclude them from ever rendering a verdict of guilty, say, of murder in the first degree because they would know if they did that they would have to, for example, get into the second phase of the trial.

"There are also people who have such a frame of mind pertaining to the death penalty where they entertain a conscientious objection to it and under no circumstances would they ever vote to impose that type of penalty.

[Footnote continued on page 257]

Her exclusion, if warranted, must rest upon her statement that she could not vote for the death penalty in a proper case.

We cannot conclude beyond the possibility of doubt that Mrs. Wilson correctly understood the phrase "proper case" as used by the court merely because two days before the court had stated that the law placed the decision as to penalty in the hands of the jury. Only a few moments earlier, however, the following discussion had transpired between the prosecuting attorney and another prospective juror. "Q. It has been suggested, I'm afraid, during the discussions of counsel that all you have to do is follow the law and follow the evidence and inevitably you will arrive at a just verdict, but you are aware that in the penalty phase of a case involving capital punishment there is no law to guide you in what is a proper case? Did you know that? A. Yes. Q. The law doesn't say if you find these facts then this is a proper case for the death penalty. You are going to have to look to your conscience and the circumstances

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[2] [Continued]

"Now, both sides to this litigation have the right to know at this time your frame of mind, but I want you to draw a distinction between a conscientious objection to the death penalty and a desire to do something other than sit on this case, because it takes a long tedious process to select twelve jurors who can perform this task, so it is not a matter that you might not want to do it, but I suggest to you and submit to you that you have an obligation as a juror of this court to sit on cases when called upon to so.

"Now, in light of those remarks, is it your frame of mind that you just don't want to sit on this case or is your frame of mind such that you entertain a conscientious objection to the death penalty?

"A I have a conscientious objection.

"Q I didn't hear you.

"A I have a conscientious objection.

"Q To the death penalty?

"A Yes.

"Q And that is of the nature that you could not in any circumstances vote in a proper case that type of punishment; is that correct?

"A That is correct.

"THE COURT: All right, Mrs. Wilson, thank you. I will excuse you from service on this case."

and decide in your own mind whether this is a proper case; do you understand that? A. Yes. Q. And you won't get any help from the law. . . . Q. . . . Now, knowing that the law is not going to help you in determining what is a proper case do you still think you can be fair to the People and fair to the defendants? A. Yes."

Although the prosecuting attorney is not authorized to instruct the jury as to the law of California,[3] Mrs. Wilson almost certainly must have accepted this explanation in the light of the failure by either the trial court or the defense attorneys to question its accuracy. Within this context Mrs. Wilson's statement that she could not impose the death penalty in a proper case made it unmistakably clear that she would automatically vote against the death penalty in every case.

3. *Defendant McGautha was not prejudiced by the introduction of prior inconsistent statements to prove the truth of the matter stated.*

Witness Watkins testified that during the trip to Bakersfield defendant McGautha had stated that some man had been "aiming down" at defendant Wilkinson, and that "he chose his life instead of Rodney's." Although this assertion suggested that the unidentified man had been killed to save Wilkinson, it left unclear the identity of the "he" who chose to protect Wilkinson in that manner. Watkins responded to this ambiguous statement by asking, "You really shot the guy?", to which one of the defendants answered, "Yes." When questioned by the prosecution Watkins stated that he did not know which defendant had given the "Yes" answer.

Subsequently, however, the prosecution introduced the following testimony of Watkins from the preliminary

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[3] The prosecuting attorney made a similar comment in argument at the penalty trial. "You will recall on voir dire each of you was asked whether or not you could impose that penalty in a proper case and at that time you probably had no notion of what constituted a proper case and you probably expected that you would get some guide lines from the Court, but you are going to find those guide lines are few."

hearing regarding Dennis McGautha's statements: "THE WITNESS: Then I asked, 'What, Man, what happened?' And he said, 'This guy, you know.' Q. Who were you asking? THE WITNESS: Talking to Dennis, and he said, 'This guy,' nothing more was said about that. And I said, 'Well, did you kill him?' He said, 'Yes I think I did.'" At the time of the trial section 1235 of the Evidence Code permitted the introduction of prior inconsistent statements for the truth of the matter stated, and the court gave no instruction limiting the use of this prior testimony to impeachment purposes. For felony murder purposes it would not matter which of two armed robbers actually shot the victim. At the penalty phase, however, since the jury may have sought to inflict the death penalty only on the robber who actually pulled the trigger, this testimony might well have played a role in the jury's deliberations, and may thus have adversely affected defendant McGautha.

In People v. Johnson (1968) 68 Cal.2d 646, we declared Evidence Code section 1235 unconstitutional insofar as it provides for the admission against a criminal defendant of prior inconsistent statements for the purpose of showing the truth of the matter therein stated. *Johnson* dealt with prior inconsistent statements rendered before a grand jury in the absence of the defendant, of his counsel, or of the ultimate trier of fact. In People v. Green (1969) —— A.C. ——, we applied *Johnson* to prior inconsistent statements given at a preliminary hearing, notwithstanding the defendant's right to cross-examination at that hearing. Accordingly, the introduction of Watkins's previous testimony appears to constitute error under *Johnson.*

Johnson errors, however, are not prejudicial per se; we must inquire, rather, whether the use of the prior inconsistent statement was "harmless beyond a reasonable doubt." (Chapman v. California (1967) 386 U.S. 18, 24.) In the instant case, subsequent testimony by Watkins rendered the use of his prior statements harmless within the meaning of *Chapman.* Some time after the introduction of those statements counsel for defendant Wilkinson cross-examined Watkins. "Q. And Dennis,

when you asked him point blank, 'Well, did you kill him?' he said, 'Yes, I think I did.' Was this asked of Dennis, and was that the answer that he gave in the car? A. Read it again, please, one time. Q. 'I said, "Well, did you kill him?" He said, "Yes, I think I did." ' A. Yes." This change in Watkins's position presented counsel for defendant McGautha with an opportunity to cross-examine Watkins in the presence of the jury as to the identity of the party answering "Yes." Counsel for McGautha declined further to examine Watkins, and he was excused.

In this case, unlike People v. Green, Watkins's identification of McGautha was subject to cross-examination at a time when the ultimate trier of fact observed Watkins's demeanor, and when McGautha's counsel was concerned with actual guilt and not its mere probability as at a preliminary hearing. If counsel for McGautha had succeeded in discrediting the identification at trial, we have no reason to believe that the jury would nonetheless have given credence to the testimony at the preliminary hearing. Conceivably, under special circumstances not present here, the ability to cross-examine the statement at trial would not be sufficient to overcome the error of admitting similar prior statements to prove their truth. In the case at hand, however, we cannot reasonably doubt that McGautha's inability to cross-examine the earlier identification in the presence of the jury did not contribute to the verdict obtained.

4. *The record does not support a conclusion that the jury, in fixing McGautha's penalty, erroneously considered the possibility of his parole.*

Prior to the commencement of deliberations by the jury at the penalty trial, the trial court gave no instructions concerning the possibility of parole. Approximately two hours after the commencement of those deliberations the foreman of the jury sent the judge a note which read as follows: "A note from instructions. 'Confinement in the state prison for life.' Does this mean that there is no possibility of parole?" Defendant McGautha contends

that this question demonstrates that the jury gave consideration to whether a life sentence involved the possibility of parole.

In response to the jury's inquiry, however, the court gave the precise instruction with regard to the possibility of parole spelled out and approved in People v. Morse (1964) 60 Cal.2d 631, 648. We cannot assume that the jury's request for a further instruction demonstrates their reluctance or refusal to follow the rendered instruction.

In *Morse* itself we covered exactly this sort of inquiry. "In evolving a proper instruction for the jury, we recognize that individual jurors often entertain some ideas of parole laws and might erroneously consider the effect of such laws upon a term of life imprisonment. *They may ask the trial judge for information upon the subject;* it is not enough for the trial court merely to refuse request and relegate them to ignorance. *To avoid such unanswered queries* and to prevent latent misconceptions, we believe the trial court, at the time of rendition of all instructions, should inform the jury in general terms that life imprisonment can result in parole but that such matters are of no concern to it." (People v. Morse, supra, 60 Cal.2d 631, 647.) (Italics added.) The trial court should, of course, have given the *Morse* instruction before the jury commenced their deliberations, but we do not believe that the mere delay could have affected the jury's decision.

5. *Defendant McGautha was afforded the effective assistance of counsel at trial.*

Defendant McGautha complains on appeal of the conduct of his counsel at trial. Although McGautha's counsel on appeal suggests improvements that might have been made in the conduct of the trial, the record does not indicate that the trial counsel exhibited such incompetence or lack of diligence as to reduce the trial to a farce or sham. (People v. Ibarra (1963) 60 Cal.2d 460, 464.)

McGautha first urges that a more vigorous defense, "relying heavily on the dangers of circumstantial evi-

dence, the strength of the presumption of innocence, and the existence of a reasonable doubt about the identification of McGautha" might have produced an acquittal or at least a lesser penalty. So general an objection can hardly warrant reversal; in inquiring whether defendant received his constitutional right to "effective aid in the preparation and trial of the case" (Powell v. Alabama (1932) 287 U.S. 45, 71) we do not attempt to measure such elusive quantities as the vigor of a defense counsel's efforts.

McGautha further complains about the following remarks in his trial counsel's argument to the jury at the guilt phase: "[U]nless you give these poor slob-type defendants the utmost consideration on every point . . . unless you give them every consideration to find these defendants not guilty, would not be shameful in and of itself. To do anything that is unconscionable or to give them every consideration, inasmuch as you are sitting as judges, that would be shameful. I'm not telling you to acquit them. I'm saying the responsibility is yours, and it will depend upon how you view the evidence. . . . If you believe sincerely, sincerely, ladies and gentlemen of the jury, that the People have met their responsibility, that quantum of proving the defendants guilty beyond a reasonable doubt, I join. My client and I will thank you for your attention."

Trial counsel certainly did not err in telling the jury that the final responsibility for finding guilt or innocence rested with it, or in stating that counsel and McGautha would accept the jury's verdict whatever it might be. If counsel had insisted in the face of very weighty evidence of guilt that McGautha be acquitted, counsel might well have impaired his credibility at the penalty phase. The reference to McGautha and Wilkinson as "slob type defendants" does appear harsh, but counsel may have made the remark to elicit some feeling of sympathy from the jury. Counsel's somewhat awkward grammer beclouds his position as to whether or not the defendants deserved every consideration, but neither bad grammar nor debatable trial tactics constitute a deprivation of the effective

assistance of counsel. Although, after the jury had already reached its own determination of guilt, counsel conceded McGauth's guilt at the penalty trial, such strategy obviously did not relate to the guilt trial and cannot be condemned as an unreasonable tactic in the penalty phase.

People v. Davis (1957) 48 Cal.2d 241, relied on by defendant McGautha, dealt with very different conduct. In *Davis* trial counsel suffered a nervous breakdown after his closing argument. Upon obtaining permission to supplement his argument, he proceeded to destroy his client's defense. Although he had at first vigorously attacked the credibility of a key prosecution witness, counsel, in his supplementary argument, recanted most of his criticisms. Referring to a number of incriminating "facts" not contained in the record, counsel undermined Davis's defense of alibi by stating his personal opinion that Davis had been present at the time of the alleged robbery and murder. The instant case presents no such extraordinary and highly prejudicial conduct.

6. *Defendant Wilkinson waived his right to object on appeal that extrajudicial statements of McGautha were introduced against him.*

At several points in their testimony, witnesses Watkins and Dupree recounted defendant McGautha's statements to them which tended to incriminate defendant Wilkinson.[4] Since McGautha did not take the stand at the guilt phase, counsel for Wilkinson could not cross-examine McGautha as to such accusations. Whenever counsel appropriately so requested, the court instructed the jury that it should not consider the challenged McGautha statement as evidence against defendant Wilkinson. Counsel for defendant Wilkinson did not so challenge all of McGautha's extrajudicial statements, however, and the court gave no general limiting instruction with regard to these statements.

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[4] McGautha's statements indicated that he and Wilkinson had been involved in a robbery of the Smetana store during which a man had been shot.

In Bruton v. United States (1968) 391 U.S. 123, the Supreme Court held that extrajudicial statements of one defendant which tended to incriminate a codefendant could not be introduced at their joint trial, notwithstanding the giving of an appropriate limiting instruction. The introduction of McGautha's statements thus violated *Bruton*. We conclude, however, that Wilkinson waived his objection by failing to attempt to exercise his rights under People v. Aranda (1965) 63 Cal.2d 518.

In *Aranda* we held that, if the prosecution proposes to introduce an extrajudicial statement of one defendant that implicates a codefendant, the trial court must adopt one of three procedures. "(1) It can permit a joint trial if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant. . . . (2) It can grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions cannot be made. (3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a codefendant, the trial court must exclude it if effective deletions are not possible." (People v. Aranda, supra, 63 Cal.2d 518, 530-531.)

In the instant case, tried two years after *Aranda*, the prosecution called both Watkins and Dupree at the preliminary hearing and questioned them as to McGautha's extrajudicial statements. This inquiry apprised defendant Wilkinson of the prosecution's probable tactics at trial, and a motion for severance under *Aranda* would have been appropriate. For reasons not apparent on the face of the record the trial court did grant a motion to sever the trial of another codefendant, Fannie Lue Smith. Defendant Wilkinson, however, neither sought a severance nor requested the deletions and exclusions authorized by *Aranda*. Having failed to exercise his right to bar the introduction of incriminating extrajudicial statements by McGautha, defendant Wilkinson cannot now complain of any resulting prejudice.

Clearly, the evidence in this case sufficiently supported both armed robbery convictions; the record also suf-

ficiently supported a first degree murder conviction under the felony-murder rule. In In re Anderson (1968) 69 A.C. 638, we considered and rejected McGautha's constitutional criticisms of the death penalty and the procedures under which it is imposed. *Witherspoon* itself rejected the contention that a jury passing on guilt in a capital case could not be limited to veniremen willing to consider imposing the death penalty. (Witherspoon v. Illinois, supra, 391 U.S. 510, 516-518.) The trial having been conducted without prejudicial error, we must hold that the convictions and sentences of both defendants should be affirmed.

The judgments are affirmed.

TOBRINER, J.

WE CONCUR:

TRAYNOR, C.J.
MCCOMB, J.
PETERS, J.
MOSK, J.
BURKE, J.
SULLIVAN, J.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

[Filed May 14, 1969, William I. Sullivan, Clerk]

Crim. No. 11860

[Title Omitted in Printing]

Petition of Dennis Councle McGautha (Appellant) for rehearing and application to extend time of finality and to stay execution DENIED.

Peters, J., is of the opinion that the requested relief including a stay of execution, should be granted.

Traynor
Chief Judge

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 486 Misc.

DENNIS COUNCLE MCGAUTHA, PETITIONER

v.

CALIFORNIA, RESPONDENT

ORDER GRANTING MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* AND GRANTING PETITION FOR WRIT OF CERTIORARI:

The motion for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is also granted limited to Question 1 presented by the petition which reads as follows:

> "1. Does California's practice of allowing capital trial juries absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty upon a defendant convicted of the crime of murder violates the Due Process Clause of the Fourteenth Amendment?"

The case is transferred to the appellate docket and placed on the summary calendar. Mr. Justice Marshall took no part in the consideration or decision of this motion and petition.

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Supreme Court of the United States

No. [redacted]c. , October Term, 19--69

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Dennis Councle McGautha,

Petitioner,

v.

California

On petition for writ of Certiorari to the Supreme ---------- Court of the State of California.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, denied. granted limited to Question 1 presented by the petition which reads as follows:

"1. Does California's practice of allowing capital trial juries absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty upon a defendant convicted of the crime of murder violate the Due Process Clause of the Fourteenth Amendment?"

The case is transferred to the appellate docket as No. 1632 and

OVERSIZE PAGE SEE NEXT FRAME
FOR REMAINDER OF PAGE

Petitioner,

v.

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On petition for writ of Certiorari to the Supreme ---------- Court of the State of California.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, ~~denied.~~ granted limited to Question 1 presented by the petition which reads as follows:

"1. Does California's practice of allowing capital trial juries absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty upon a defendant convicted of the crime of murder violate the Due Process Clause of the Fourteenth Amendment?"

The case is transferred to the appellate docket as No. 1632 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 1, 1970

Mr. Justice Marshall took no part in the consideration or decision of this motion and petition.